

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

DAVID D. WILBON, et al., )  
 )  
Plaintiffs, )  
 )  
vs. ) No. 12 C 1132  
 )  
JOSEPH M. PLOVANICH, et al., ) Chicago, Illinois  
 ) August 17, 2017  
Defendants. ) 10:10 A.M.

TRANSCRIPT OF PROCEEDINGS - Status  
BEFORE THE HONORABLE M. DAVID WEISMAN, Magistrate Judge

APPEARANCES:

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1 (Proceedings had in open court.)

2 THE COURT: All right. Does everyone want to go  
3 around and just put your names on the record and then we'll see  
4 how far we can get?

5 MS. PINKSTON: Kristin Pinkston for defendants.

6 MS. O'MALLEY: Dana O'Malley for defendants.

7 MS. ROMELFANGER: Allison Romelfanger for defendants.

8 MR. REGENSCHEIT: Daniel Regenscheit for the  
9 plaintiffs.

10 MS. DYM KAR: Irene Dymkar for the plaintiffs.

11 And Torrey Hamilton will be arriving in a couple of  
12 minutes for plaintiffs.

13 THE COURT: Great. And when Ms. Hamilton gets here,  
14 we'll make that on the record.

15 All right. So we are continuing our review of the  
16 deposition that we have been going on for a while of  
17 Mr. Thorton. And we are at -- I have us at page 145.

18 Does anyone think we're somewhat different?

19 MS. DYM KAR: 144, line 25. So it is a line before  
20 that.

21 And there are a couple of matters I would like to  
22 address with the Court before that.

23 THE COURT: Sure. Give me one second. I want to get  
24 a red pen because that's how I have been tracking it.

25 (Brief interruption.)

1 THE COURT: I'm sorry. Ms. Dymkar, go ahead.

2 MS. DYM KAR: There was a preliminary ruling by the  
3 Court regarding whether Keith Thorton could be asked whether he  
4 told anybody that he saw people coming out of the bar. And you  
5 had asked us to try to determine which officer might have said  
6 that there was a bar involved.

7 And it is Esquivel, and we have four page citations.  
8 I have got a couple of the pages here.

9 So it is Esquivel, 69, 70, 74, 75, 76, and 93. And I  
10 do have a couple of them here where it just clearly says that  
11 Keith Thorton said these guys were causing a disturbance  
12 outside a bar.

13 MS. O'MALLEY: I'm sorry, could you read those pages  
14 again?

15 MS. DYM KAR: Sure. 69, 70, 74, 75, 76, and 93.

16 THE COURT. All right. Where in the transcript of  
17 Mr. Thorton's deposition does that come up? And did you want  
18 me to re- -- I'm assuming you are asking me to reconsider that.

19 MS. DYM KAR: You said that it would come in, but it  
20 was a preliminary ruling. We just wanted to firm that up.

21 THE COURT: Oh, perfect. Okay. Tell me where we are.

22 MR. REGENSCHEIT: Page 93, 25 to 94, 18.

23 THE COURT: Okay. 93, 25. You are correct. That's  
24 what I have in my notes, conditional and showing an officer  
25 said this happened.

1 MS. PINKSTON: Uh-huh.

2 THE COURT: All right. So this exchange, it is  
3 basically a question asking Mr. Thorton, is there a bar on that  
4 block? Mr. Thorton, saying, I have no idea.

5 And then some questions as to whether he told -- if he  
6 remembers telling a police officer that there was a bar on the  
7 block.

8 I had conditionally admitted that conditioned on  
9 showing an officer said this happened. I don't have -- I don't  
10 know if I have Mr. -- or defendant Esquivel's transcript, but  
11 I'm assuming -- does defense counsel?

12 MS. PINKSTON: I did not bring it with me, your Honor.

13 MS. O'MALLEY: No.

14 THE COURT: One minute. I may have it.

15 You guys brought a bunch of deps, right?

16 MS. O'MALLEY: I believe you have all of the deps at  
17 this point.

18 MS. PINKSTON: Yes.

19 THE COURT: All right.

20 (Brief interruption.)

21 THE COURT: All right. So this is page 69 of Noel  
22 Esquivel's deposition, lines 13 through 17. The question is:  
23 What, if anything, you did hear him say to any officers or any  
24 officers say to him? The him referring to Mr. Wilbon. I'm  
25 sorry to Mr. Thorton.

1           And the answer: I heard him say that he was pointing  
2 to the gentleman outside the car. Those were the guys over at  
3 Menard causing a disturbance outside the bar. And he pointed  
4 directly at David Wilbon and said he is the one that threw the  
5 bottle at the police officer. So that's 69.

6           Page 70, there is a reference to Officer Esquivel  
7 saying, if there was a disturbance outside the bar. I heard  
8 him say that those were the fellows that were causing the  
9 disturbance outside the bar. Again he's referring to  
10 Mr. Thorton.

11           Page 74. Did he again, Mr. Thorton, say where this  
12 happened?

13           Answer: Yeah, outside the bar.

14           Okay. I'm satisfied that there is a showing that the  
15 officer said Mr. Thorton said it happened near a bar.

16           Anything from the defendants on that point?

17           MS. PINKSTON: No, your Honor.

18           THE COURT: All right. Next, Ms. Dymkar. Thank you.

19           MS. DYM KAR: The other thing, your Honor, we had -- we  
20 filed objections back in June, the idea that maybe if the Court  
21 issued a ruling on certain issues, it would go more quickly  
22 going through the deposition transcript.

23           And specifically we wanted the Court to make a ruling  
24 on testimony of a show-up. And this is where Keith Thorton  
25 says, there was a woman and a man officer -- this is a Document

1 415, page 2.

2 Keith Thorton said that a man and a woman officer told  
3 me to get in the car. I drove in the car past plaintiffs, and  
4 I pointed out David Wilbon.

5 And what we said was that these -- the male and female  
6 officers were not defendants. They were never identified  
7 throughout the whole case. They never appeared on event  
8 queries or attendance and assignment sheets. But most  
9 important, the defendants never testified that this show-up  
10 occurred, that there was a police car, a marked police car,  
11 with a man and woman officer that drove past the plaintiffs and  
12 David -- and excuse me -- Keith Thorton pointed out the --  
13 David Wilbon. And so --

14 THE COURT: Let me just understand. You're saying  
15 that the evidence currently based on deposition testimony is  
16 that no officer says that type of show-up occurred?

17 MS. DYM KAR: Right.

18 THE COURT: All right. Keep going.

19 MS. DYM KAR: So we're saying that any alleged  
20 conversations between Thorton and the male and female officers  
21 are hearsay, and that it is not -- it is not -- it can't be  
22 used for collective knowledge of the officers who arrested  
23 plaintiffs because they never referred to any kind of a show-up  
24 that took place.

25 They say there is an identification that happened a

1 different way, but not that there was a marked car, the male  
2 and female officer that drove by.

3 THE COURT: All right. Let me stop you. When you say  
4 they say a show-up happened a different way, how different do  
5 they describe it? For example, you talked about a marked car  
6 versus an unmarked car. Are those the differences?

7 MS. DYM KAR: No.

8 THE COURT: Okay.

9 MS. DYM KAR: Officer Kushiner says that Keith Thorton  
10 came over on foot. Keith Thorton denies that.

11 Keith Thorton came over on foot and that he pointed  
12 out all the plaintiffs and said that they were all involved.  
13 But so there is no show-up, no pointing out of David Wilbon in  
14 a car with this male and female officer.

15 And I said we were -- throughout discovery we were  
16 never able to identify who these officers were. We went  
17 through attendance and assignment sheets. We came at it all  
18 these different ways, and we could not identify who  
19 these -- these would be uniformed officers in a marked car  
20 going past.

21 And so anything he says he said to them or they said  
22 to him, including an identification of David Wilbon, is all --  
23 is all hearsay.

24 And most important is it is not relevant because the  
25 defendant officers don't say it happened, don't say they

1 communicated with somebody who drove past for a show-up.

2 THE COURT: All right. First of all, for the record,  
3 Ms. Hamilton has arrived. No worries on timing. I just want  
4 the record clear on that.

5 Let me hear from defendants on that issue.

6 MS. PINKSTON: Sure, your Honor. This has been argued  
7 before, your Honor, and this deposition testimony was provided  
8 both in court as well as in Document Number 418.

9 Noel Esquivel testified that he observed a civilian in  
10 the back of a marked police car who pointed to plaintiff David  
11 Wilbon and identified him as the person he observed throw a  
12 bottle at a police officer.

13 The citations are 58, lines 9 through 60, lines  
14 20. 65 --

15 THE COURT: I'm sorry. Can you start again?

16 MS. PINKSTON: Sure, 58, line 9 through 60, line 20;  
17 65, line 12 through 21; 67, line 15 through 69, line 19; 72,  
18 line 12 through 73, line 4; 73, line 10 through 14.

19 Additionally, while I understand it is the Court's  
20 argument about what the defendants -- not the Court's argument,  
21 excuse me -- the Court's position that it is most relevant as  
22 to what the defendants knew at the time. Plaintiff David  
23 Wilbon also testified to observing this show-up.

24 So -- but there is testimony from Noel Esquivel as to  
25 observing this civilian in the back of the marked police car.



1 MS. DYM KAR: Esquivel testified that there was a car  
2 parked down the street and that he talked to David Wilbon in  
3 the car.

4 What we're concerned about is the communications that  
5 he says, you know, they told me to get into the car. I got  
6 into the car. I told them that that was David Wilbon.

7 All the communications with him are with this male,  
8 female officer. They never could establish that this male,  
9 female officer said anything to anybody outside.

10 And so this -- it just -- it is baffling because we  
11 could never identify who these officers were and whether this  
12 show-up actually occurred.

13 But any communications he had with these two officers  
14 who are not defendants, were never named, including an  
15 identification of David Wilbon, does not seem to have been  
16 communicated to anybody standing in the street or anybody in  
17 the station, is totally disconnected from --

18 THE COURT: So I'm not clear -- I understand the  
19 argument. So one thing I'm not comfortable ruling on now, I  
20 want to look at, is what showing needs to be made that the  
21 statement was made to begin with? Because the hearsay issue,  
22 presuming those statements were made, I don't see a hearsay  
23 problem because it goes to the state of mind of the defendants.  
24 They were told this.

25 It is not -- it may not have been true. But

1 that -- that's what they were told. And that's why the state  
2 of mind exception exists for hearsay because it -- you know, it  
3 is not being offered for the truth of the matter; i.e., what  
4 the person said, it is being offered to show what the officers  
5 knew and why they acted the way they did.

6 But I'm looking at the issue below that which is what  
7 showing needs to be made that the statement itself was actually  
8 made. And I'm not clear what you're asking -- I'm not  
9 comfortable ruling until I look at that issue.

10 MS. DYM KAR: Okay.

11 THE COURT: But I'm not clear on what you're asking me  
12 to consider.

13 Give me just one moment, please.

14 (Brief interruption.)

15 THE COURT: Sorry about that.

16 All right. So what are you asking me to rule on? I  
17 understand the issue. As I said, I want to look at the -- I  
18 want to look at the issue of what showing needs to be made that  
19 the statement was actually made to begin with to satisfy, you  
20 know, what I think is an acceptable hearsay exception because  
21 it goes to state of mind. It is not being offered for the  
22 truth of the matter.

23 But what are you asking me to do?

24 MS. DYM KAR: It may not be helpful to addressing this  
25 as an issue. I thought it would be. But if -- I think what

1 you are saying is you want to see what -- who said what as we  
2 work our way through. I was identifying that as an issue  
3 because they -- this show-up -- first of all, we doubt that it  
4 happened, but --

5 THE COURT: Can I just make a comment on this? So I  
6 appreciate your subjective assessment of what you believe and  
7 don't believe. But, again, I'm trying to get us in a good  
8 position to have an efficient trial. And it is one thing to  
9 say we doubt it happened. That's fine. But it is not really  
10 relevant.

11 If there is places where people say this happened, and  
12 you question their integrity or credibility, totally fine. But  
13 the record is not we doubt it happened, it would be -- should  
14 be people say it happened. That helps me.

15 It does not help me to decide anything to hear what  
16 you believe or don't believe.

17 MS. HAMILTON: Can I interject?

18 THE COURT: Sure.

19 MS. HAMILTON: It was my suggestion actually having --  
20 we spent like three and a half hours going through the rest of  
21 this and discussing it and trying to figure out if there was  
22 stuff that we could agree on --

23 THE COURT: I appreciate that.

24 MS. HAMILTON: -- that would make this go a little  
25 quicker.

1 THE COURT: Yeah, I totally appreciate that.

2 MS. HAMILTON: And so it was my suggestion that we  
3 address this show-up issue first because if, depending on your  
4 Honor's ruling, you know, there are certain portions -- there  
5 is many portions of the next bit of the transcript that  
6 plaintiff believes should be out because of the arguments that  
7 Ms. Dymkar has made about the show-up being not something that  
8 was communicated to the officers, so not a probable cause  
9 determination.

10 So whichever way your Honor rules on that, if your  
11 Honor was to say, for example, that the show-up is out, then we  
12 would have -- certain -- we would be able to tell you certain  
13 things.

14 And if the show-up is in, there is additional things  
15 we could agree on that would make this faster.

16 So that's the reason why we bring it up first.

17 THE COURT: Okay. No, I appreciate that. So as I  
18 understand it, Mr. Wilbon is -- I'm sorry -- Mr. Thorton is  
19 saying this show-up happened, and these are the things that I  
20 did and this is how the show-up happened.

21 You're questioning the relevance of that. If that  
22 information was never communicated to the officers, okay, I  
23 understand that.

24 The city is saying, at least Officer Esquivel says  
25 something like this happened.

1 All right. Do you have other evidence, other than  
2 Officer Esquivel? And I will pull 418 and look at it.

3 But do you have other places in the record as it  
4 stands now with depositions where someone is saying something  
5 like this happened?

6 MS. PINKSTON: David Wilbon.

7 THE COURT: Okay. And is that cited in 418?

8 MS. PINKSTON: No, it is not because, based upon the  
9 oral argument, my understanding was the Court's position was  
10 they only wanted a citation to the defendants's testimony as to  
11 what the defendants knew, but I can get those citations  
12 immediately after this hearing.

13 THE COURT: Okay.

14 MS. HAMILTON: So maybe I could suggest, your Honor,  
15 that we could just -- I can identify what portions plaintiff  
16 objects to based on that issue.

17 THE COURT: Okay.

18 MS. HAMILTON: And then your Honor could rule. And  
19 then I think we might be able to talk again and even narrow it  
20 down -- just those portions that have to do with the show-up,  
21 we'll be able to --

22 THE COURT: Yeah, we can --

23 MS. HAMILTON: -- depending on how your Honor rules.

24 THE COURT: Sure. We can say this is contingent on  
25 the show-up ruling. I mean, I do -- I appreciate your

1 position. I -- and I -- to me if there is a factual inquiry if  
2 that information was conveyed to the officers. You know,  
3 if -- you know, if Mr. Thorton said, I pulled out my yearbook  
4 and said, see, I know these guys, and -- that's great  
5 information that was never communicated to the officers, I  
6 don't know how relevant it is. You know, that has been the  
7 struggle with all of this.

8 So I'm happy to kind of flag that stuff and then look  
9 further at the issue.

10 MS. HAMILTON: Okay.

11 THE COURT: As I said I'm comfortable with the  
12 principle of hearsay involved. I need to look further at when  
13 someone is questioning whether the statement ever happened or  
14 was conveyed to anyone.

15 So, you know, people can't use state of mind exception  
16 to get in something that at the time they didn't know. That  
17 defeats the underlying principle of the rule. So --

18 MS. DYM KAR: Okay.

19 THE COURT: -- why don't we -- that's a great idea.  
20 As we get through those, we can identify those, and I can -- we  
21 can kind of move through it more quickly.

22 All right. Anything else we want to talk about before  
23 we --

24 MS. DYM KAR: No, your Honor.

25 THE COURT: Okay. So --

1 MS. O'MALLEY: I just have one apology. I didn't  
2 print the email from Ms. Hamilton, so I am looking at my phone.  
3 So I apologize I had my phone out, your Honor, but --

4 THE COURT: Do you want a printout of it?

5 MS. O'MALLEY: No, it is fine. I can read use my  
6 phone.

7 THE COURT: Oh, okay.

8 MS. O'MALLEY: I just apologize for having my phone on  
9 the table.

10 THE COURT: That's fine.

11 MS. HAMILTON: I have it here. It is because we don't  
12 know whether the show-up thing is coming in or not --

13 MS. O'MALLEY: Right.

14 MS. HAMILTON: -- I am going to be flipping back and  
15 forth, and I might not be as quick as I would like to be, but I  
16 think I have it all.

17 THE COURT: If anyone wants something printed out to  
18 help this go quicker, I am happy -- you can send it to my  
19 email, and I'm happy to print it out for you if you think  
20 that's going to help.

21 MS. O'MALLEY: I'm okay.

22 THE COURT: I'm not offended by the phone. Trust me,  
23 I have got teenagers at home. That's not --

24 Okay. So Ms. Dymkar corrected me and -- properly  
25 saying 144, line 25, is where we stopped.

1 MS. DYM KAR: Yes.

2 THE COURT: Okay. And --

3 MS. HAMILTON: So plaintiff has an objection based on  
4 the show-up issues from 144, 25 to 145, 3.

5 THE COURT: Okay.

6 MS. HAMILTON: However if the show-up is in, then  
7 plaintiff has no other objections to that.

8 THE COURT: Okay. I'm going to mark those SU for my  
9 purposes, and then I will know once we rule on that.

10 MS. HAMILTON: Okay.

11 Ready, Judge?

12 THE COURT: Yes. Thanks.

13 MS. HAMILTON: So then 145, 4 to 145, 22 is agreed.

14 THE COURT: As being in, correct?

15 MS. HAMILTON: Yes.

16 THE COURT: Okay.

17 MS. DYM KAR: Wait a minute.

18 MS. HAMILTON: Yes, 145, 23 is not because of the  
19 show-up.

20 MS. DYM KAR: 146, 2.

21 THE COURT: I'm --

22 MS. HAMILTON: I'm not there yet.

23 MS. DYM KAR: I'm sorry.

24 (Discussion off the record.)

25 MS. HAMILTON: Okay. Don't worry.



1           Okay. So then 145, 23 to 146, 2 is a show-up  
2 objection.

3           THE COURT: Okay.

4           MS. HAMILTON: If the show-up comes in, plaintiff has  
5 no other objection to that portion.

6           THE COURT: Great.

7           MS. HAMILTON: Okay. Then 146, 3 to 147, 4, is  
8 agreed.

9           THE COURT: Perfect.

10          MS. HAMILTON: Sorry. So we're at 147. That's the  
11 next designation portion, right?

12          MS. DYM KAR: Right.

13          MS. HAMILTON: So 147, 12 to 154, 6, plaintiff is  
14 objecting based on the show-up objection.

15          THE COURT: Okay.

16          I'm sorry, Ms. Hamilton, where does that end, 147, 12  
17 to?

18          MS. HAMILTON: To 154, 6.

19          THE COURT: Oh.

20          MS. HAMILTON: So that's a big portion. But within  
21 that -- tell me when you're ready.

22          THE COURT: Yeah, let me just mark all this, and then  
23 I'll get back.

24          If you have objections --

25          MS. HAMILTON: I have a couple of things -- yeah, a

1 couple of things in the bag.

2 THE COURT: Okay.

3 MS. O'MALLEY: I'm sorry, what was the end of your  
4 number?

5 MS. HAMILTON: 154, 6.

6 MS. O'MALLEY: Thank you.

7 MS. HAMILTON: But that's if the show-up.

8 MS. O'MALLEY: Yes.

9 MS. HAMILTON: And then I'm going to go back through  
10 and --

11 MS. O'MALLEY: That's fine.

12 MS. HAMILTON: All right.

13 THE COURT: I've got two more pages.

14 MS. HAMILTON: Okay.

15 THE COURT: All right. All subject to the show-up  
16 issue, and then you have additional objections.

17 MS. HAMILTON: Yeah, and then if we could -- if we can  
18 go back, right back to 147, 12, let me go back through it  
19 should the show-up come in --

20 THE COURT: Okay.

21 MS. HAMILTON: -- sorry that is confusing, but --

22 THE COURT: No, no, no. I'm tracking it.

23 MS. HAMILTON: So 147, 12 to 147, 15, if the show-up  
24 is in, no objection.

25 THE COURT: Okay.

1 MS. HAMILTON: 147, 15, up to the word -- I'm sorry.  
2 Oh, beginning with the word and to line 20, we object  
3 as hearsay. Plaintiff objects as -- with a -- makes a hearsay  
4 objection to that portion.

5 THE COURT: Okay. Give me a moment.

6 MS. HAMILTON: Sure.

7 THE COURT: Okay. Defendants's response.

8 So we're looking at 147, line 15 through 20.

9 MS. HAMILTON: Just beginning with the word and, your  
10 Honor.

11 THE COURT: Yes, thanks.

12 MS. PINKSTON: I mean, we understand the objection,  
13 your Honor. However it is not being offered for the truth of  
14 the matter asserted, it is being offered for context. Because  
15 if the show-up actually comes in, there needs to be some  
16 context as to why he's in the back of this car.

17 THE COURT: Response to that?

18 MS. HAMILTON: I think that there is some context in  
19 other places where he is talking about actions and not what  
20 some unknown police officer is actually saying. And I would  
21 actually submit that it is being offered for the truth of the  
22 matter asserted because the defendants are putting forth that  
23 this show-up occurred, and we're saying that we don't think it  
24 did. So that's the plaintiffs's response.

25 THE COURT: And Mr. Thorton says the show-up occurred?

1 MS. PINKSTON: Correct.

2 THE COURT: The person who is testifying to this.

3 MS. PINKSTON: Yes.

4 THE COURT: Okay. So for the record, the lines that  
5 are objectionable, beyond just the show-up issue, and a female  
6 officer actually says, she, and the female officer said that,  
7 quote, would you like to come with us? We're going to put you  
8 in the back seat of our squad car, go around the block. The  
9 individuals are standing at the vehicle. We just want you to  
10 identify who threw the bottle. I said, okay, not a problem.

11 I'm going to overrule the objection. I don't think it  
12 is being offered for the truth of the matter.

13 I do understand your objection, Ms. Hamilton, that  
14 it -- there is some semblance of it being offered for the truth  
15 because it says a show-up occurred, but I think that issue will  
16 get swallowed into my ruling on whether the show-up comes in or  
17 not to begin with.

18 But I don't -- presuming that I think there is a  
19 sufficient showing related to the show-up itself, I don't think  
20 those lines are being offered for the truth of the matter over  
21 your objection as noted.

22 MS. HAMILTON: Understood.

23 Okay. So then 147, 21 to 148, 11, the plaintiff would  
24 still like -- would like to be in, even if it -- which is  
25 designated by the plaintiff anyways, I believe.

1 MS. DYM KAR: If the show-up is in then --

2 MS. HAMILTON: Then the plaintiff wants that in.

3 Which is already designated, I just want to make that clear.

4 MS. O'MALLEY: Defendants don't object to that, your  
5 Honor.

6 THE COURT: Okay.

7 MS. HAMILTON: Okay? So then moving on to the next  
8 portion. It is 148, 12 to 148, 19.

9 THE COURT: I'm sorry. Can I -- I just want to make  
10 sure I'm tracking it.

11 MS. HAMILTON: Uh-huh.

12 THE COURT: The 21 -- 147, 21, through 148, 11, you're  
13 saying if the show-up comes in, you want that in. If the show-  
14 up doesn't come in, you don't want that in.

15 MS. HAMILTON: Correct.

16 THE COURT: Okay. I'm tracking you. Go ahead.

17 MS. HAMILTON: Yeah. Right now I'm just going through  
18 the portions of the larger chunk that I gave you where if the  
19 show-up is coming in, these are our objections --

20 THE COURT: Okay.

21 MS. HAMILTON: -- and also non-objections to this  
22 portion.

23 THE COURT: Okay. Got it.

24 MS. HAMILTON: So then moving on. So 148, 12 to 148,  
25 19, even if the show-up comes in, plaintiff would register a

1 hearsay objection to this portion.

2 THE COURT: Okay. Give me a second.

3 MS. HAMILTON: Also duplicative.

4 THE COURT: And based on my prior ruling, what is the  
5 truth of the matter -- where in this statement do you think the  
6 truth of the matter is being offered? It is being offered for  
7 the truth of the matter.

8 MS. HAMILTON: I would just -- it is the same --

9 THE COURT: Okay.

10 MS. HAMILTON: -- almost the same testimony as the  
11 previous objection. I don't really see much different from it,  
12 so I would just state the same objection as that I stated a  
13 moment ago.

14 THE COURT: Okay. So for the record, the question is  
15 do you know these two officers, female, male, officers, saying  
16 anything about having been on the 1300 block of North Menard?

17 Answer: No. They just simply said, don't worry,  
18 we're going to put you in the back of the squad car, and we're  
19 going to drive past. And if you see anybody that matches the  
20 description that you gave us, let us know, and that's exactly  
21 what they did.

22 Again, I don't see it being offered for the truth of  
23 the matter. I do see why there is some semblance of that. It  
24 is relevant to being the truth of the matter as to the show-up  
25 itself occurring, but presuming that I find it -- presuming I

1 find past that issue, I don't think it does anything further  
2 than show that the show-up happened. Or Mr. -- I shouldn't say  
3 that. That Mr. Thorton says the show-up happened. So that's  
4 overruled with your objection noted.

5 MS. HAMILTON: Okay. So then the next portion is 148,  
6 20 to 149, 12. And should the show-up come in, then there is  
7 no objection to that portion.

8 THE COURT: Okay.

9 MS. HAMILTON: Then 149, 13 to 149, 15,  
10 plaintiff -- it is plaintiffs's designation, and plaintiff  
11 withdraws the designation. So we don't need that piece.

12 THE COURT: Okay.

13 MS. HAMILTON: That can come out.

14 Sorry. Let me just make sure.

15 THE COURT: So you want that out even if the show-up  
16 part comes in?

17 MS. HAMILTON: Yes.

18 THE COURT: Okay. Defendants have any objection to  
19 that coming out?

20 MS. PINKSTON: No, your Honor.

21 MS. O'MALLEY: No.

22 THE COURT: Okay. So that will be out, 149, line 13  
23 through 15.

24 MS. HAMILTON: Okay. 149, line 16 through 150, line  
25 9, plaintiff would like to, even if the show-up comes in, lodge

1 an objection of relevancy.

2 THE COURT: Okay. Let me read it.

3 MS. DYM KAR: And that has to do with your previous  
4 ruling, your Honor, about where he was going, whether he was  
5 going to a gas station or fire station or it didn't matter.

6 THE COURT: Okay.

7 MS. DYM KAR: And so I think it is consistent with your  
8 previous ruling.

9 THE COURT: What's the city's response to relevance?

10 MS. PINKSTON: Well, your Honor, in terms of the -- it  
11 is not the context or -- excuse me -- the purpose of this  
12 specific statement here with regard to him saying that he was  
13 going to a firehouse is because many of the officers on -- who  
14 are defendants in this case believed him to be a fireman. And  
15 so the communication that he was going to the firehouse is  
16 relevant for those defendants who don't know his name but are  
17 referring to the fireman witness. So it is not about where he  
18 was on his way to, it is about his identification as somehow  
19 being associated with a firehouse.

20 THE COURT: Let me hear from you.

21 MS. HAMILTON: Yeah, in response to that, it seems  
22 that -- I mean, I understand the defendants's argument. I am  
23 not sure because I wasn't part of the -- when we started going  
24 through this transcript if that comes up someplace else. But  
25 if we could -- we could just limit it to that. And it could



1 say, did you ever tell the lieutenant that you were a  
2 firefighter? And the end of that first paragraph is, I was  
3 going to the firehouse, and I did tell her that.

4 But the rest of it I don't even think has anything to  
5 do --

6 THE COURT: All right. Yeah, I like that, that  
7 compromise.

8 So the first paragraph Mr. Thorton is saying -- there  
9 is reference to saying, I was going to the firehouse, which,  
10 again, he was not a firefighter, correct, he was in some type  
11 of program.

12 MS. PINKSTON: He was a volunteer.

13 THE COURT: All right. But that would give the jury  
14 context.

15 And to the extent officers said they understood him to  
16 be a firefighter, that also would give context to that  
17 understanding. So the part where he says, I told her I wanted  
18 to go, I was going to the firehouse, I did tell her that, will  
19 come in.

20 This next part then goes on, and at that point I was  
21 very scared so she said to wait.

22 And then he talks about there is a scene outside and  
23 they cleared it, and there is some question about what do you  
24 mean by cleared what scene? That to me is not particularly  
25 relevant. There is a danger of confusion here because whatever

1 that scene was, it may or may not have involved the plaintiffs.  
2 And it doesn't seem, unless there is some other part in here,  
3 it doesn't seem to get much clearer, and I think it would lead  
4 to jury confusion. So that will go out.

5 So it is out on line 22 at page 149 through line 13 on  
6 page 150.

7 MS. HAMILTON: So --

8 THE COURT: Oh, I'm sorry --

9 MS. HAMILTON: Line 10 you mean?

10 THE COURT: Yeah, line 9. Page 150, line 9.

11 MS. HAMILTON: Right.

12 Okay. Given that ruling, your Honor, we do believe --  
13 I think, I just withdrew it -- but the prior, did you call the  
14 fire station to tell them you were coming? No, I was not. We  
15 think that that should -- I know I just told you to withdraw  
16 that, but since the fire -- that issue about the firefighter  
17 will be coming in, we think that that should come in as well,

18 So it should go from 13 -- you know, did you call the  
19 fire station and tell them you were coming?

20 Answer: No, I was not.

21 Did you -- did you ever tell the lieutenant, the  
22 lieutenant that you were a firefighter?

23 Answer: She asked me where I was going. I told her I  
24 wanted to go to -- I was going to the firehouse, and I did tell  
25 her that.

1 THE COURT: All right. That will come back in. So  
2 line -- page 149, line 13 through 15 just adds fuller context.

3 So that's in without objection, I take it, from the  
4 defendants, correct?

5 MS. PINKSTON: Correct.

6 MS. HAMILTON: Okay. Then the next line would be page  
7 150, line 10 through 150, line 21. And then if the show-up  
8 comes in, then the plaintiff has no objection to that portion.

9 THE COURT: Okay.

10 MS. DYM KAR: And line 22 is just -- that should never  
11 have been designated as something we wanted in. There was just  
12 some problems with the equipment.

13 MS. HAMILTON: So plaintiff withdraws 150, line 22.  
14 It is actually Irene talking to the videographer, so --

15 THE COURT: Okay.

16 MS. PINKSTON: And we understand we're going to be  
17 removing the objections and that sort of thing as well,  
18 correct?

19 MS. HAMILTON: Yeah.

20 THE COURT: Yeah.

21 MS. PINKSTON: Okay.

22 THE COURT: So just for the record, I don't think  
23 there is any objection to any of this. 150 line 22 through --

24 MS. HAMILTON: Plaintiff withdraws.

25 THE COURT: Yeah. You don't want that in, right?

1 MS. HAMILTON: Correct.

2 THE COURT: Okay. Line -- so line 22 at 150 through  
3 151, line 5, there is all this stuff with the videographer.

4 That -- if you can get that out, we'd like all that  
5 out.

6 MS. PINKSTON: Yes, your Honor.

7 MS. HAMILTON: Okay. Then continuing with should the  
8 show-up come in, beginning line 51 -- 151, line 6 to 153, line  
9 19, no objection.

10 THE COURT: Okay.

11 MS. HAMILTON: Okay. Then are you ready?

12 THE COURT: Uh-huh.

13 MS. HAMILTON: Then 153, line 20 to 154, 6, which I  
14 think brings us up to the chunk that we were talking about for  
15 the show-up, we would like to make a hearsay objection --

16 THE COURT: Okay.

17 MS. HAMILTON: -- in addition to the show-up.

18 THE COURT: Okay.

19 MS. PINKSTON: I'm sorry, what was that part?

20 MS. HAMILTON: 153, 20 to 154, 6.

21 THE COURT: Okay. So your objection is hearsay,  
22 correct?

23 MS. HAMILTON: Yes.

24 MS. DYM KAR: It is our alternate objection.

25 THE COURT: Uh-huh. What's the city's response?

1 MS. PINKSTON: No objection. We can take that out.

2 THE COURT: Okay.

3 MS. HAMILTON: Are we ready?

4 THE COURT: Yeah.

5 MS. HAMILTON: So then beginning 154, line 7 to 155,  
6 line 9, it is agreed.

7 THE COURT: That's all in?

8 MS. HAMILTON: Yes.

9 THE COURT: Great.

10 MS. HAMILTON: Okay. Then we have another chunk that  
11 is objected to because of the show-up. So that's 156, 4 to  
12 157, 23.

13 THE COURT: And so your objection is to show-up?

14 MS. HAMILTON: Yes.

15 THE COURT: Okay.

16 MS. HAMILTON: If we could do the same thing that we  
17 just did on the previous chunk --

18 THE COURT: Yeah.

19 MS. HAMILTON: -- we objected to, and this portion --  
20 chunk is not very professional, is it?

21 THE COURT: It is apt. 157 through 23, correct?

22 MS. HAMILTON: Yes.

23 THE COURT: Okay. And do you have additional  
24 objections beyond the show-up?

25 MS. HAMILTON: Yes.

1 THE COURT: Okay.

2 MS. HAMILTON: Let me just get to those.

3 So if the show-up comes in, then from 156, 4 to 156,  
4 14, plaintiff withdraws her designations. So if this portion  
5 comes in, plaintiff withdraws the designations. You could just  
6 withdraw them either way I suppose.

7 THE COURT: I'm not following that. So if it doesn't  
8 come in because of show-up, you don't want it in.

9 MS. HAMILTON: It is not -- right, exactly.

10 THE COURT: I understand. Let me just make a note of  
11 that.

12 Understood.

13 MS. HAMILTON: Okay. Then 150 --

14 THE COURT: I'm sorry. Before you move forward, does  
15 the city want this in? That was -- you didn't have that.

16 MS. HAMILTON: 156, 4 to 14.

17 MS. PINKSTON: Yeah.

18 No, we don't have it, your Honor. Thank you.

19 THE COURT: Okay. Go ahead, Ms. Hamilton.

20 MS. HAMILTON: Okay. 156, 15 to 156, 22, should the  
21 show-up come in, plaintiff has no objection to that portion.

22 THE COURT: Okay.

23 MS. HAMILTON: Okay. And then 156, 23 to 157, 7,  
24 plaintiff, in addition to the show-up objection, would lodge a  
25 hearsay objection.

1 THE COURT: Hearsay. Okay. Let me look.

2 MS. HAMILTON: And a relevance objection.

3 THE COURT: Okay. Let's start with your relevance  
4 objection. I'm not tracking that one.

5 MS. HAMILTON: Okay. Well, so I guess maybe this is  
6 kind of close to the show-up objection already, so I'm not sure  
7 if I am just restating it. But because these are statements  
8 made -- that were made between him and these unknown police  
9 officers who were never identified and not subject to any sort  
10 of cross examination, I'm not sure that it is relevant to the  
11 case. So I think I maybe just stated the show-up objection  
12 again.

13 THE COURT: Okay.

14 MS. HAMILTON: Sorry.

15 THE COURT: All right. So you want to focus -- I'm  
16 going to overrule the relevance objection because it summarizes  
17 the statement he says to these two officers, albeit you can't  
18 identify them, who then repeated it to one of the defendant  
19 officers.

20 Can I ask a quick question? On page 157, line 5, it  
21 says, at that point they -- these were the two officers that  
22 have not been identified -- pulled up. They talked to one of  
23 the officers there.

24 Are they talking about an officer at a deposition or  
25 just there on the scene?

1 MS. PINKSTON: In terms of what Keith Thorton knows?

2 THE COURT: Yes.

3 MS. PINKSTON: Keith Thorton doesn't know which  
4 officer that they spoke to.

5 THE COURT: Okay. So the -- I think it is relevant.  
6 There -- it is officers conveying information about what  
7 Mr. Thorton just did, which was identify someone. So --

8 MS. HAMILTON: Understood.

9 THE COURT: -- there is relevance there. I understand  
10 the show-up objection, how that is linked there.

11 MS. HAMILTON: Okay.

12 THE COURT: Now let me look at it for hearsay.

13 MS. DYM KAR: Your Honor, can I state further what you  
14 just read? That they told them exactly what I said. There is  
15 abbreviation in some things that Keith Thorton said. So he  
16 said, they said exactly what I said, and we don't know what  
17 that is. And defense counsel could have questioned further  
18 during the deposition about, you know, what is it that got  
19 communicated from the man or woman officer in the car to  
20 anybody else, and they didn't.

21 So exactly what I said, I think the Court has ruled  
22 previous in this deposition transcript that you can't have this  
23 telescoped. You know, whatever I said, that's what was told to  
24 them because that's not defined.

25 THE COURT: I have done that in the past in this case



1 with this transcript where the answer was everything I just  
2 told you is what I said or words to that effect. And that was  
3 so ambiguous as to everything in the deposition. What does  
4 that mean?

5 But in this context, here's a question and answer,  
6 tell me exactly what you said.

7 Let me search farther back. This is on page 156, line  
8 23.

9 Question: What, if anything, did you say to either of  
10 the two officers in the car?

11 Answer: I just told you that these -- I just told you  
12 that three minutes ago, ma'am. Quote, that's the guy right  
13 there, close quote.

14 Question: Tell me exactly what you said.

15 Answer: Quote, that's the guy right there in the red  
16 with the dreadlocks, dark skinned. That's him right there,  
17 close quote.

18 The answer continues. At that point they pulled up,  
19 they talked to one of the officers there and said they told  
20 them exactly what I said, and we left.

21 To me in context they told them exactly what I said is  
22 clear that he has just told -- said twice now, that's the guy  
23 right there, that's the guy right there in the red with the  
24 dreadlocks, dark skinned, that's him right there. Something  
25 like that. That's how he normally communicates.

1           So I agree with you I have said in the past in this  
2 transcript, you know, a general everything I just said isn't  
3 sufficient. But in context here I don't think there is any  
4 ambiguity as to the gist of what he was saying.

5           You're right, defense counsel could have asked more  
6 questions and so could you have. So --

7           MS. DYM KAR: The other --

8           THE COURT: -- that I think we'll stay with.

9           But let me focus on the hearsay next.

10          Do you have something else before I get to hearsay?

11          MS. DYM KAR: It might be the hearsay.

12          THE COURT: Okay.

13          MS. DYM KAR: But we don't know who he's talking to,  
14 and we don't know if it is any of the defendants. We had a  
15 large number of officers come out of the 15th District and were  
16 there. I mean, there are certain ones we have identified and  
17 were involved in this particular arrest. But who were the two  
18 officers in the car communicating to him whether it was one of  
19 the defendants or not --

20          THE COURT: Yeah, that is -- I agree with that,  
21 Ms. Dymkar.

22          What's the city's response to that?

23          MS. PINKSTON: It is not being offered for the truth  
24 of the matter asserted that this is the person who threw the  
25 bottle. What it is is, and, again, the deposition citations

1 for defendant Esquivel has been provided, along with -- I will  
2 provide the citations to the plaintiffs's deposition.

3 This is information that was absolutely communicated  
4 to at least one defendant officer that was relied upon in  
5 arresting David Wilbon.

6 So it goes, obviously, to defendants's state of mind.

7 MS. DYM KAR: This -- I don't think any of the  
8 defendants said that there was a man -- a male and a female  
9 officer who communicated anything to them about an  
10 identification.

11 I don't think you can identify -- there is nobody who  
12 said that this -- there is no defendant who said that this  
13 show-up, driveby show-up, occurred. Esquivel says he talked to  
14 Keith Thorton in a car, but that was down the street. It  
15 wasn't -- and it said that it wasn't a communication between  
16 officers.

17 THE COURT: Okay. So we have got two levels of  
18 hearsay here. First of all, what Mr. Thorton says he said is  
19 hearsay.

20 MS. DYM KAR: Uh-huh.

21 THE COURT: It is being offered for the truth of the  
22 matter because it -- the only relevance to that is that he's  
23 identified the person in this context. Because it is true we  
24 don't know who was told this information. So simply because  
25 he's present in court or via deposition, he can't repeat an

1 out-of-court statement and use it for the truth of the matter.

2 Now if the testimony had been that he said that's the  
3 guy right there, and I told defendant Esquivel that that was  
4 the guy, then it would not be offered for the truth of the  
5 matter, it would be being offered for defendant Esquivel's  
6 state of mind, why did he arrest Mr. Wilbon.

7 MS. DYM KAR: Right.

8 THE COURT: But that's not what we have here. So it  
9 is being offered for the truth of the matter there.

10 But there is a second level of hearsay because, as  
11 Ms. Dymkar says, then he says the two officers told some other  
12 officers he's picked out the guy.

13 Now I'm -- I will reconsider this if Esquivel says two  
14 officers -- or you can show me some other way where Esquivel or  
15 one of the defendant officers was saying, I heard this  
16 information from, you know, close enough, for judicial  
17 purposes, that it is -- I heard this information that Thorton  
18 picked out Mr. Wilbon from one of my fellow officers that meets  
19 this, this exchange, I'll reconsider.

20 But right now we have got hearsay. Mr. Wilbon -- I'm  
21 sorry -- Mr. Thorton saying to the officers, that's the guy.  
22 And then the officers saying to some other officers, not our  
23 defendant officers as the record stands now, that's the guy.

24 Those are two levels of hearsay. So the hearsay  
25 objection is going to be sustained.

1 MS. HAMILTON: Okay. So that was 156, 23 to 157, 7.

2 THE COURT: Yes.

3 MS. HAMILTON: Okay. So then 157, 8 to 157, 10. If  
4 the show-up comes in, no objection.

5 THE COURT: Okay.

6 MS. HAMILTON: 157, 11 to 157, 16, we're making a  
7 hearsay objection again.

8 THE COURT: Okay.

9 MS. HAMILTON: Line 11 through line 16 on 157.

10 MS. O'MALLEY: We'll agree to that, your Honor.

11 THE COURT: Okay. So that's out as hearsay.

12 MS. HAMILTON: Then 157, 17 to 157, 23, should the  
13 show-up testimony come in, then there is no objection to that  
14 portion.

15 THE COURT: Okay.

16 MS. HAMILTON: Okay. That should take care of that  
17 portion. The larger portion that I mentioned before, was all  
18 objected to because of show-up.

19 Now moving on 157, 25 to 158, 8, is agreed.

20 THE COURT: Okay. Let me ask counsel something now.  
21 So this editing, having done some of this in the past, is -- it  
22 is not as easy as just highlighting on a piece of paper. So  
23 I'm just looking, as an example, page 157, line 24, and it  
24 reads after you --

25 MS. PINKSTON: Uh-huh.

1           THE COURT:  -- strike that -- after you entered the  
2 police station.

3           Obviously the substantive rulings I have made and we  
4 have argued, those are important.  To me -- and I just want to  
5 get an agreement with the parties -- if in the editing process  
6 they are like we cannot get rid of this one -- these four words  
7 after you strike that after you entered the police station, I  
8 want to have an agreement with the parties no one is going to  
9 throw a fit or an objection if those kind of extraneous things  
10 from an editing standpoint just have to stay in.

11           We're all good with that?

12           MS. HAMILTON:  We are good with that.  Where it  
13 matters -- I'm actually -- where a line -- we believe a line  
14 needs to be broken up for some other objectionable reason, I'm  
15 noting that clearly --

16           THE COURT:  Okay.

17           MS. HAMILTON:  -- so --

18           THE COURT:  Okay.  And, city, you're good with that?

19           MS. PINKSTON:  Yes.

20           THE COURT:  Okay.  Continue, Ms. Hamilton.

21           MS. HAMILTON:  I think the next designation begins at  
22 159, 6.

23           THE COURT:  Yes.  Between --

24           MS. HAMILTON:  So 159, 6 to line 18.  159, 6 to 18,  
25 plaintiff is objecting because of the show-up.  The same show-

1 up argument.

2 If the show-up comes in, that's the only objection  
3 plaintiff has to that portion.

4 THE COURT: Okay. Let me just read this real quick.

5 MS. HAMILTON: Sure.

6 (Brief interruption.)

7 THE COURT: Okay. Go ahead.

8 MS. HAMILTON: Okay. I believe the next portion is --  
9 begins on 159, 22.

10 THE COURT: Uh-huh.

11 MS. HAMILTON: So 159, 22 to 160, 18, is agreed.

12 THE COURT: Okay.

13 MS. HAMILTON: And then 160, line 19 through 162, line  
14 7, plaintiff has the show -- objection based on the show-up  
15 argument. And --

16 MS. O'MALLEY: I'm sorry, 162, what? Seven?

17 THE COURT: Seven.

18 MS. HAMILTON: Yes, sorry.

19 So then -- once everybody is ready.

20 THE COURT: Okay. Sorry.

21 MS. HAMILTON: No problem.

22 So then I'd like to take that portion and go through  
23 it --

24 THE COURT: Okay.

25 MS. HAMILTON: -- and give you the plaintiffs's

1 objections and agreements should the show-up be admissible.

2 THE COURT: Okay.

3 MS. HAMILTON: Okay. So from page 160, line 19 to  
4 161, line 11, that is -- plaintiff has no objection if the  
5 show-up comes in.

6 THE COURT: Okay.

7 MS. HAMILTON: The next one is a little tricky.  
8 Sorry, Judge, I need to turn to it.

9 THE COURT: Take your time.

10 MS. HAMILTON: Sorry.

11 (Brief interruption.)

12 THE COURT: You can't have an objection to that though  
13 because it is a question.

14 MS. HAMILTON: I think -- I think when we were reading  
15 --

16 THE COURT: Well, I shouldn't say that. It would be  
17 hard pressed to have an objection --

18 MS. HAMILTON: I know.

19 THE COURT: -- seeing the question.

20 MS. HAMILTON: So when you look at the answer, it is  
21 -- clearly there is an answer of the -- there is a question at  
22 the end that is what's being answered. And so I guess  
23 plaintiffs's objection would be that it is extraneous. It is  
24 not really what the witness is testifying to. It is a  
25 question, yes, but it is not actually what the testimony is



1 being provided -- it is not testimony.

2 THE COURT: Okay. So you're objecting 161, 12 through  
3 line 15.

4 MS. HAMILTON: 161, 12 through 14 through the word  
5 red.

6 THE COURT: Red.

7 MS. HAMILTON: The question that the witness answers  
8 and the testimony provided is actually in response to the  
9 question that begins at the end of line 14 with the word did.  
10 Did the man or woman officer talk to any of the officers  
11 outside the vehicle?

12 Answer: I'm quite sure they went outside. I was  
13 inside so I do not know who they spoke to, if they spoke to  
14 anyone.

15 THE COURT: All right. The part you're objecting to  
16 is when you pulled up in front of the six or seven individuals  
17 in handcuffs and you pointed out a person who was wearing -- in  
18 dreadlocks wearing red.

19 MS. HAMILTON: Right.

20 THE COURT: And then the question continues, did the  
21 man or a woman officer talk to any of the officers outside the  
22 vehicle?

23 MS. HAMILTON: Right. If it doesn't make sense  
24 without the first clause, when you pulled up in front of the  
25 six or seven individuals in handcuffs, did the man or woman

1 officer talk to any officers outside the vehicle, I mean, just  
2 to orient the question, I don't know if the videographers can  
3 even do that, but we would like to make the request.

4 THE COURT: All right. But I just -- before I even  
5 entertain it, this your question though, correct?

6 MS. HAMILTON: Yes, sir.

7 THE COURT: Okay. It is going to be overruled.

8 MS. HAMILTON: Okay.

9 THE COURT: Just for the record, it is -- I don't see  
10 there is any jury confusion. And, generally speaking, there is  
11 -- you know, the -- the question itself, it is not an answer.  
12 If it misstates the record, so be it. No one objected to it,  
13 and it is your question, so --

14 MS. HAMILTON: Understood, your Honor.

15 THE COURT: I wouldn't be as cavalier if it were not  
16 your question, but that's how you framed it.

17 MS. HAMILTON: Understood.

18 And then 161, 20 to 162, 7, should the show-up come  
19 in, plaintiff would like to also lodge a hearsay objection to  
20 that portion.

21 THE COURT: Okay.

22 MS. DYM KAR: There is also a possible jury confusion  
23 and ambiguity there in his answer.

24 THE COURT: In the same exchange?

25 MS. DYM KAR: Pardon me?

1 THE COURT: In the same exchange?

2 MS. DYM KAR: Yes.

3 THE COURT: All right. Let me finish reading, and  
4 then I'll hear you out.

5 MS. DYM KAR: Okay. Sorry.

6 (Brief interruption.)

7 THE COURT: All right. Ms. Dymkar, I cut you short.  
8 Tell me the jury confusion issue, and then we'll discuss  
9 hearsay.

10 MS. DYM KAR: Okay. I believe the male passenger just  
11 gave a thumbs up is ambiguous. A thumbs up means yes, but yes  
12 to what. And it relates to like to what he is saying to the  
13 male and female officer, which we're saying shouldn't come in.

14 So the thumbs up indication, it is a gesture, which is  
15 a communication. That's where the hearsay objection comes in.

16 But it is also ambiguous and could confuse the jury.

17 THE COURT: All right. I see that. Tell me -- what's  
18 the city's view on this?

19 MS. PINKSTON: So I suppose we're operating under the  
20 context that the show-up is coming in, what this particular  
21 objection would be. I don't -- if the show-up is coming in,  
22 then I don't see how this is causing jury confusion.

23 Oh, you're talking about hearsay, your Honor?

24 THE COURT: Well --

25 MS. PINKSTON: I would have to look at case law, to be

1 honest. I don't think this is hearsay. They were talking  
2 about a gesture. It is not an out-of-court statement.

3 THE COURT: Actually there is pretty good case law  
4 that gestures can be -- let me get the rule. But I know there  
5 is case law on -- they looked at whether a dog indicating as a  
6 positive drug test is a communication, and there is case law.  
7 But I know within the -- within human communication -- let me  
8 pull the rule real quick.

9 MS. PINKSTON: I suppose -- I understand that gestures  
10 can be communication. But what is -- I think the issue is the  
11 drug --

12 THE COURT: Let me just stop you, just so the record  
13 is clear.

14 MS. HAMILTON: Sure.

15 THE COURT: Rule 801 statement. 801(a), statement  
16 means a person's oral assertion, written assertion or  
17 non-verbal conduct if the person intended it as an assertion.  
18 So I think it is well established that non-verbal conduct can  
19 still be a statement.

20 I interrupted you. So here's where -- here's where I  
21 am on this. So the jury confusion issue, I think Ms. Dymkar is  
22 correct, it is not clear what the non-verbal thumbs up gesture  
23 means because we don't know what was said to begin with. We  
24 don't know who is saying it. And it can mean a whole bunch of  
25 different things. It could mean, let's get coffee after this.

1 I have no idea.

2 And just so I'm clear on this, the male passenger who  
3 gives a thumbs up, we don't know who that is, do we?

4 MS. PINKSTON: No, your Honor.

5 THE COURT: Okay. So it is not that one of the  
6 defendant officers will say, yeah, I remember this happening,  
7 and I gave them a thumbs up. There is nothing like that.

8 MS. PINKSTON: No, your Honor.

9 MS. DYM KAR: It is not clear who the male passenger is  
10 communicating to either.

11 THE COURT: Yeah, no, I think that those are all true,  
12 and I -- I think there is a hearsay issue. But I'm more  
13 concerned about how this is relevant because it -- I know there  
14 is a continuation of events, but there is communication in here  
15 or evidence of communication that we don't know about. So like  
16 to me there is jury confusion here and relevance. It is not  
17 clear how this is, other than context. It is not clear to me  
18 how it is relevant, so I would sustain the objection.

19 MS. HAMILTON: So that's 161, 20 to 162, 7.

20 THE COURT: Correct.

21 MS. HAMILTON: Okay.

22 THE COURT: I'm not reaching the hearsay issue though.

23 MS. HAMILTON: Okay. Then I believe the next portion,  
24 designation, begins 162, 9. That would be plaintiffs's  
25 portion. And plaintiff would still like that to come in. So I

1 don't know if the defendants have any objection.

2 162, 9 to 24.

3 THE COURT: And this will be the last chunk before  
4 Ms. Warren needs to take a break.

5 MS. HAMILTON: Okay. It is 187 pages long, so we're  
6 getting through it.

7 THE COURT: Yeah.

8 MS. PINKSTON: No objection from defendants.

9 THE COURT: Okay. So one -- page 162, line 9 through  
10 24 is going to come in. Correct?

11 MS. HAMILTON: Yes.

12 THE COURT: All right.

13 (Brief recess.)

14 MS. PINKSTON: While we were waiting -- oh, the  
15 citations for David Wilbon, do you want it on the record?

16 THE COURT: Sure.

17 MS. PINKSTON: The citations to the David Wilbon  
18 deposition transcript where his testimony reveals that he also  
19 observed some type of show-up, page 62, line 21 through page  
20 67, line 11.

21 (Discussion off the record.)

22 THE COURT: Okay. Back on the record.

23 MS. HAMILTON: Okay. Back on the record with the  
24 Thorton designations. I believe we were at 162, 25.

25 THE COURT: Correct.

1 MS. HAMILTON: So from 162, 25 to 163, 10, plaintiff  
2 objects on relevance. And just to -- this is a portion where  
3 he's talking about basically sitting -- after he is sitting in  
4 the police station, and he's talking about stuff that doesn't  
5 really seem relevant.

6 THE COURT: Okay. Let me read this.

7 (Brief interruption.)

8 THE COURT: What's the city's view on this?

9 MS. PINKSTON: That's just what I was going to ask  
10 you, if you were going to withdraw after that.

11 MS. O'MALLEY: Yes.

12 MS. PINKSTON: So we'll agree to that, your Honor.

13 THE COURT: Okay.

14 MS. PINKSTON: With the understanding that it would be  
15 162, line 25 through --

16 MS. HAMILTON: 164, 2.

17 MS. PINKSTON: -- 164, 2, yeah.

18 THE COURT: All that is out.

19 MS. HAMILTON: Yes. Because plaintiffs did some --  
20 just so the record is clear, plaintiff is withdrawing  
21 his -- plaintiffs are withdrawing their designations from 163,  
22 line 11 to 164, line 2.

23 THE COURT: Okay.

24 MS. HAMILTON: Okay. Then moving on. 164, I think  
25 the next designation begins at 21 --

1 MS. O'MALLEY: Correct.

2 MS. HAMILTON: -- to 166, 5. There is no objection,  
3 so that --

4 THE COURT: That's in?

5 MS. HAMILTON: Yes.

6 THE COURT: Great. Okay.

7 MS. HAMILTON: Okay. And then the next portion I  
8 believe is 166, 9. And so from 166, 9 to 167, 17, there is  
9 also no objection. So that's agreed.

10 THE COURT: Okay.

11 MS. HAMILTON: And -- are you ready, Judge?

12 THE COURT: Uh-huh.

13 MS. HAMILTON: I'm sorry.

14 So then there is a -- sort of a little bit of a  
15 different kind of situation. The transcript at 166, 18 to 23,  
16 if you could look there.

17 THE COURT: Okay.

18 MS. HAMILTON: So I have discussed this with defense  
19 counsel. There appears to be something incorrect in the  
20 transcript. And there is a video here. And so if you see  
21 where it says at line 19, it says, it names the Officer  
22 Kronovich, but there is no Kronovich. That was obviously  
23 Plovanich. And we think that the video actually says  
24 Plovanich.

25 So I'd ask defense counsel if they would be willing to



1 stipulate and correct the transcript. And we're going to check  
2 the video and verify that it does says Plovanich. And if it  
3 does, I believe we're going to be in agreement about that.

4 MS. O'MALLEY: That's correct.

5 THE COURT: Okay.

6 MS. HAMILTON: And so --

7 THE COURT: And where -- and just so I'm clear, we're  
8 talking about the video coming in anyway, correct?

9 MS. HAMILTON: Uh-huh.

10 THE COURT: Correct? We're just using the  
11 transcript --

12 MS. HAMILTON: Right.

13 THE COURT: -- to help us do that part.

14 MS. PINKSTON: Right.

15 MS. O'MALLEY: So our intention was we'll just watch  
16 that part of the video. I'm sure it says Plovanich. I just  
17 want to check it --

18 THE COURT: Sure.

19 MS. O'MALLEY: -- so we're okay.

20 THE COURT: Okay.

21 MS. O'MALLEY: It would make sense because the next  
22 one is Millan. So as long as it says that, then this obviously  
23 can come in.

24 MS. HAMILTON: Yeah.

25 THE COURT: Okay. So, Ms. Hamilton, we're -- I

1 understand where we are, line 18 through where?

2 MS. HAMILTON: 23.

3 THE COURT: Okay.

4 MS. HAMILTON: We think that --

5 THE COURT: Subject to city confirming.

6 MS. HAMILTON: Correct.

7 THE COURT: Okay.

8 MS. HAMILTON: So then beginning on line -- we think  
9 the fact that we would like one -- line 18 to 23 ending with  
10 the word ma'am to come in with the corrected transcript, you  
11 know, should the transcript actually be used at trial for some  
12 purpose.

13 And then plaintiff logs an objection on line 23, page  
14 166, beginning with the word I, going in to page 167, line 5,  
15 based on the show-up objection.

16 MS. DYM KAR: There is a reference to the show-up, so  
17 if the show-up comes in, then that whole answer should come in.

18 THE COURT: All right. And how far on 167 are you  
19 going on that?

20 MS. HAMILTON: 167, 5.

21 THE COURT: 5. Okay. So this is all show-up.

22 MS. HAMILTON: And other than that objection with  
23 respect to the show-up, there is no other objection.

24 THE COURT: Okay.

25 MS. HAMILTON: Then 167, line 6 to 167, line 12, no

1 objection.

2 THE COURT: Okay.

3 MS. HAMILTON: One -- stop me if I am going too fast.

4 THE COURT: No.

5 MS. HAMILTON: 167, 19 to 169, 4, no objection.

6 THE COURT: And the city is in agreement, correct?

7 MS. O'MALLEY: That's correct. This is what we worked  
8 out before today, your Honor.

9 THE COURT: Okay. Perfect. I'll stop asking now.  
10 Unless I hear from you, I'll assume you have no objection as  
11 well.

12 Okay.

13 MS. HAMILTON: So I ended at 169, 4. And the next  
14 designation begins 169, 11 to 170, 23, no objection.

15 THE COURT: Great. Okay.

16 MS. HAMILTON: Okay. Then beginning page 170, line 24  
17 to page 172, line 2, plaintiff would like to allege a couple of  
18 objections.

19 THE COURT: Okay.

20 MS. HAMILTON: So first we'd make a hearsay objection  
21 to portions of it. We would also make a 403 prejudice, it is  
22 more prejudicial than probative objection.

23 THE COURT: Okay.

24 MS. HAMILTON: I'm sure you want to read it now.

25 THE COURT: Yeah. Give me a second.

1 (Brief interruption.)

2 THE COURT: And where does this stop?

3 MS. HAMILTON: 172, 2.

4 THE COURT: Okay.

5 Okay. All right. I have read it. Tell me your  
6 objections.

7 MS. HAMILTON: So we object to the conversation with  
8 the assistant State's Attorney as hearsay. And we also think  
9 there is portions of that conversation that they're prejudicial  
10 about how he was feeling and some other portions of it that we  
11 believe are -- they are just prejudicial, and they are not  
12 probative of anything, any claim or defense.

13 THE COURT: All right. Let me hear from the city.  
14 How -- let's start with the probative issue, how does this meet  
15 401 to begin with?

16 MS. O'MALLEY: Well, your Honor, we're actually in  
17 agreement with 170, 24 through 171, line 17, coming out.

18 THE COURT: Okay.

19 MS. O'MALLEY: Those are actually plaintiffs's --

20 MS. HAMILTON: Oh.

21 MS. O'MALLEY: -- designations.

22 Our offering is 171, 18 through 20, where he  
23 identifies Mr. Wilbon to the ASA.

24 MS. HAMILTON: I'm sorry, can you say again what  
25 you're in agreement with?

1 MS. O'MALLEY: Yeah, absolutely.

2 We're in agreement with 170, line 24 through 171, line  
3 17.

4 MS. HAMILTON: Okay.

5 MS. O'MALLEY: And then we offer line 171, line 18  
6 through 171, line 20.

7 THE COURT: Okay. So, Ms. Hamilton, let's focus on  
8 171, lines 18 through 20.

9 What's your objection there?

10 MS. HAMILTON: Irene.

11 MS. DYM KAR: Oh, it is a hearsay objection.  
12 There -- he's talking about talking to the State's Attorney and  
13 identifying David Wilbon. And then -- that's a hearsay  
14 discussion with him and a State's Attorney. And the State's  
15 Attorney is not going to recall that happening. And -- so, you  
16 know, all the conversations and all the testimony in court, all  
17 the happenings in court, we're saying are hearsay, in addition  
18 to, you know, what he ends up saying about being afraid and  
19 they're taunting and staring at me.

20 THE COURT: Well, we're at 18 through 20.

21 MS. HAMILTON: Yeah, just 18 through 20.

22 MS. DYM KAR: Okay.

23 THE COURT: All right. So -- and whether or not the  
24 State's Attorney's Office remembers this statement being made,  
25 why isn't this hearsay or subject to an exemption?

1 MS. PINKSTON: So I do recognize that in the context  
2 this is an out-of-court statement because he's saying if he was  
3 asked if he recognized David Wilbon. That's correct.

4 And who asked that? Whoever the gentleman was.

5 And you said that you recognized him as a person that  
6 threw the bottle. That is correct. I did identify him.

7 So in terms of the actual hearsay, the -- whether the  
8 action of identifying him, once again, in court goes to  
9 corroborating the identification on scene, which is essential  
10 to the malicious prosecution claim here.

11 It is not about, once again, whether David Wilbon is  
12 -- did in fact throw the bottle, but, rather, the fact that the  
13 identification occurred itself.

14 THE COURT: All right. Let me make sure I'm  
15 understanding this. No one is going to be questioned whether  
16 Mr. Thorton identified Mr. Wilbon as the person who threw the  
17 bottle, right? There is going to be no -- do you anticipate  
18 impeaching him? I mean, you know what his testimony is going  
19 to be. Do you anticipate impeaching him on the fact or is  
20 there something in here that impeaches him that he never made  
21 the initial identification?

22 I know you don't believe it. I know you don't trust  
23 it. But there is an exception of hearsay for a prior  
24 consistent statement to rebut recent fabrication. There is a  
25 couple other ways you can use it to rebut.

1 But the -- if you're not doing that, this is hearsay.  
2 Even though he is in court, this is what Judge Kendall refers  
3 to as just because you're here you cannot -- doesn't mean you  
4 can say it. He is repeating an out-of-court statement here in  
5 the deposition, which would be his testimony at trial. And  
6 the -- the only relevance I'm hearing is that he identified the  
7 guy. We already know he's done that. He's going to say he did  
8 that, and it is going to come in for other reasons.

9 But here it is to the State's Attorney. I don't  
10 know -- unless it is being used to rebut a suggestion of recent  
11 fabrication or the rules have been expanded somewhat as to what  
12 other reasons you can do it, he's giving it to a third party  
13 whose state of mind is not relevant at all. So to me this is  
14 hearsay, unless I'm missing something.

15 MS. PINKSTON: I don't -- I don't think the ASA's  
16 state of mind is completely irrelevant, only to the extent that  
17 they have to prove with the malicious prosecution claim that  
18 the dismissal was indicative of innocence. So the fact that  
19 the State's Attorney is the one who dismissed the charges, the  
20 reason for dismissing the charges does go to the element of  
21 indicative of innocence.

22 THE COURT: Are you calling the State's Attorney?

23 MS. PINKSTON: I believe so.

24 MS. O'MALLEY: I think so.

25 MS. PINKSTON: Yeah.

1 MS. DYM KAR: But we don't even know who Keith Thorton  
2 is talking to. You said you recognized him as the person who  
3 threw the bottles. So we don't even know who Keith Thorton  
4 thinks he's talking to or he doesn't report who he's talking  
5 to.

6 He refers to the gentleman.

7 MS. PINKSTON: But our purpose isn't that it is  
8 necessarily being made to the State's Attorney, but rather that  
9 it is -- it is supporting his prior identification of David  
10 Wilbon.

11 THE COURT: All right. On that basis I am going to  
12 sustain the objection. It is hearsay.

13 MS. HAMILTON: Okay. Then I think we're at 172, 3.  
14 And from 172, 3 until -- well, hold on.

15 I have that right -- I'm sorry.

16 THE COURT: I have got line 21, and he said, you don't  
17 have to stay.

18 MS. HAMILTON: So I believe Ms. O'Malley said that  
19 they agreed. We had objected up until 172, 2. But they had  
20 only agreed up until 17 -- we have only dealt up with to 171,  
21 20.

22 Am I correct?

23 THE COURT: That's correct.

24 MS. HAMILTON: Okay. So then that still leaves our  
25 objection from 171, 21 to 172, 2.



1 THE COURT: And what's your objection there?

2 But that's what you guys want in.

3 MS. HAMILTON: Okay. We just had it in one big chunk,  
4 so we'll --

5 THE COURT: Am I missing this?

6 MS. PINKSTON: No, it is the designation.

7 THE COURT: Yeah.

8 MS. HAMILTON: It is their designation.

9 MS. O'MALLEY: We'll agree that it is withdrawn.

10 THE COURT: Okay. So you -- all right.

11 And that's through 172, 2, correct?

12 MS. HAMILTON: Correct.

13 THE COURT: Okay. So that's all out.

14 Now we're on 172, 3.

15 MS. HAMILTON: Yes. So 172, 3 to 173, 9, is mixed,  
16 both plaintiff and defendant designations. And plaintiff  
17 objects to this portion based on relevance and also for  
18 portions of it are hearsay.

19 THE COURT: Okay. You have no objection to 172, line  
20 3 through line 10, correct?

21 MS. HAMILTON: No, 172, line -- we do. We're  
22 withdrawing it. I just am putting it in one big -- we'll  
23 withdraw our designation from 173 -- '72, 3 to 172, 10,  
24 depending on how you rule on the plaintiff -- on the  
25 defendants's designations.

1 THE COURT: Oh, okay.

2 MS. HAMILTON: I was putting it altogether --

3 THE COURT: Got it. Understood.

4 MS. HAMILTON: -- because ours is only proposed if  
5 theirs --

6 THE COURT: Understood. Okay.

7 So tell me your objections to there.

8 MS. O'MALLEY: Okay. So this section we have a  
9 relevance objection and a hearsay objection for portions of it.  
10 You'll see -- you'll be able to tell which ones are the  
11 hearsay.

12 THE COURT: Okay.

13 MS. DYM KAR: And prejudice too. The taunting, staring  
14 at me. They were taunting and staring at me.

15 THE COURT: How far does this go, 173?

16 MS. HAMILTON: Nine.

17 THE COURT: Okay.

18 All right. Let's start with the relevance, prejudice  
19 objection. Let me hear from the city on this.

20 MS. PINKSTON: In terms of relevance, it does go to  
21 the malicious prosecution claim in terms of why Mr. Thorton is  
22 asking to leave.

23 THE COURT: And is the case dropped this day?

24 MS. PINKSTON: Yes.

25 THE COURT: Okay. And what does the assistant State's

1 Attorney say about Mr. Thorton being there and why -- how that  
2 relates to whatever the disposition was.

3 MS. HAMILTON: I think the transcript says, doesn't  
4 it, that it says we have one witness here, but police officer  
5 is not here. I think that's all it says.

6 MS. PINKSTON: That was my recollection as well, and I  
7 don't -- yeah, I believe that's what it says.

8 THE COURT: Okay.

9 MS. PINKSTON: On the transcript for the court  
10 hearing, yes.

11 THE COURT: And is that going to be -- is that going  
12 to come into evidence?

13 MS. PINKSTON: We are not offering it.

14 THE COURT: Is the State's Attorney -- assistant  
15 State's Attorney going to -- has someone interviewed him? Is  
16 his recollection or her recollection consistent with that?

17 MS. PINKSTON: I -- I don't -- yeah, I mean, my -- my  
18 recollection is that there is not a memory of this particular  
19 date.

20 THE COURT: Okay.

21 MS. HAMILTON: Judge, we may have to, perhaps, as past  
22 recollection recorded or --

23 THE COURT: The transcript?

24 MS. HAMILTON: Depending on what -- right. We  
25 don't -- haven't decided yet because we actually

1 haven't -- nobody took the deposition of the State's Attorneys?

2 MS. PINKSTON: That's correct.

3 MS. DYM KAR: But we talked to them at the time when  
4 depositions were taking place, and they had absolutely no  
5 recollection.

6 MS. PINKSTON: That was my recollection as well of  
7 what happened.

8 THE COURT: All right. Let's kind of just do this in  
9 chunks, using your legal term.

10 Page 172, line 11 through line 24 is going to be out  
11 based on 403. Here he's talking about -- Mr. Thorton is  
12 talking about being taunting -- being taunted at and stared at  
13 and he's uncomfortable being in the courtroom. And  
14 he's -- earlier in the testimony he -- it is not even clear who  
15 they're -- who he's referring to. There is earlier testimony.

16 The question says, you said that that there were many  
17 people there. Are you talking about David Wilbon's family  
18 members?

19 Answer: I don't -- and the question continues.

20 Or are you talking about other criminal defendants.

21 Answer: I have no idea who they were, but they were  
22 definitely with him and his party.

23 And I don't know who they were because then he says,  
24 they were taunting and staring at me. I think there is an  
25 issue of jury confusion. And it is prejudicial because what

1 Mr. Wilbon -- even if we presume to be Mr. Wilbon's family  
2 members, there is a danger the jury will think that Mr. Wilbon  
3 has done something wrong because his family members are doing  
4 something.

5 So all that is out through line 24 on page 172.

6 So I don't know if that addresses what the plaintiffs  
7 want in, but right now line 11, 172 is out.

8 Now as to the malicious prosecution, the testimony  
9 then continues.

10 Question: And this is outside the courtroom?

11 Answer: This was in the back of the courtroom, in the  
12 courtroom.

13 Question: So he -- referring, presumably, to the  
14 State's Attorney said, after you said that, he said you could  
15 leave.

16 Answer: I said -- I asked him what am I doing here?  
17 I came here. I did what I had to do. Am I done here?

18 He said yes, everything is fine, you can go.

19 Now to me there is the same issue of the jury  
20 confusion because as Ms. Dymkar correctly points out, it is not  
21 even clear who he's talking to.

22 I don't understand the relevance. The relevance  
23 offered by the city is it goes to malicious prosecution claim.  
24 But this doesn't change -- this really doesn't add to the  
25 malicious -- malicious prosecution calculation. It doesn't

1 explain what the State's Attorney did or why they did it. So I  
2 don't see the relevance. It is a malicious prosecution claim.

3 MS. PINKSTON: Yeah, based upon -- right.

4 Based upon the testimony regarding his fear and  
5 asking -- and telling the who we presume to be the State's  
6 Attorney that he doesn't feel safe here, defendants would agree  
7 that that portion doesn't add anything.

8 THE COURT: All right. So all that is going to be  
9 out.

10 Now Ms. --

11 MS. HAMILTON: Yeah.

12 THE COURT: Is line 21 on page 170 through 10, line 10  
13 on 172 now out?

14 MS. HAMILTON: Yeah. I think we're out now all the  
15 way up to 173, 10, which I know is not yet on your transcript,  
16 but a --

17 THE COURT: All right. So now we're at 173, 10.

18 MS. HAMILTON: So we apprised defense counsel of this,  
19 but I have the right to designate, though it is not previously  
20 designated and I apologize for that, line 37 -- 173, 10 through  
21 174, 1. I don't know if they have any objection. I let them  
22 know last night that we would be asking.

23 THE COURT: Have you guys had time to think about this  
24 from the city?

25 Take a second.

1 MS. O'MALLEY: I haven't looked at that this morning.

2 THE COURT: Take a second. I'm going to -- I'm going  
3 to grab my phone.

4 (Brief interruption.)

5 THE COURT: Okay. Whenever you're ready.

6 MS. O'MALLEY: Based on your prior rulings, your  
7 Honor, we don't believe that this is relevant.

8 (Discussion off the record.)

9 MS. O'MALLEY: And I should add, your Honor, we're  
10 also willing to withdraw 174, 2 through 12, based on the  
11 rulings that we talked about just a minute ago.

12 THE COURT: Okay.

13 MS. HAMILTON: So --

14 THE COURT: Let me just --

15 MS. HAMILTON: Yeah.

16 THE COURT: All right. Tell me why this is relevant.

17 MS. HAMILTON: Okay. So the only -- we don't actually  
18 want the whole thing, but, unfortunately, the way that it  
19 is -- the answer comes out, what we want is one little piece  
20 right in the middle. It doesn't really make sense without the  
21 whole thing, so that's why we proposed it that way.

22 THE COURT: Tell me.

23 MS. HAMILTON: So the piece that we think is relevant  
24 is the fact that Mr. Thorton says the officers were there. And  
25 I think that there will be a defense that the reason the case

1 was dismissed is because the officers weren't there, so that's  
2 the -- that's the relevancy.

3 MS. PINKSTON: Do you want us to respond, your Honor?

4 THE COURT: Sure.

5 MS. PINKSTON: He doesn't identify what officers they  
6 are. We don't know if these are any defendant officers or if  
7 they're officers that are there for another case in the  
8 courtroom.

9 THE COURT: Yeah, I'm -- I don't see the relevance of  
10 this.

11 First of all, whether the officers were there or  
12 not -- well, strike that.

13 Whether Mr. Thorton saw the officers there or not does  
14 not seem very probative. Why the State's Attorney or assistant  
15 State's Attorney chose to dismiss the case is the issue. If he  
16 says the officers weren't there, that's why I dismissed the  
17 case. And he was the wrong, but he's -- his reasoning was  
18 still he thought the officers weren't there. That's -- that is  
19 more relevant than an ambiguous reference to the officers were  
20 on the right side sitting on the benches, without more linking  
21 it to any of the 11 or so defendants we'd have.

22 So I -- I don't -- I see there is a marginal probative  
23 value, but the potential jury confusion in other -- and general  
24 lack of relevance tells me this should stay out.

25 MS. HAMILTON: Okay. Then if -- I think defendants



1 just withdrew their 174, 2 through 12.

2 THE COURT: Correct.

3 MS. PINKSTON: Yes.

4 MS. HAMILTON: So then plaintiff will withdraw 175, 5  
5 through 19.

6 THE COURT: Okay.

7 MS. HAMILTON: And also withdraw 176, 8 through 17.

8 THE COURT: Okay.

9 MS. HAMILTON: And then the next portion of  
10 designation is 176, 18 to 177, 20.

11 THE COURT: Okay.

12 MS. HAMILTON: Plaintiff objects to that portion based  
13 on hearsay.

14 THE COURT: Okay.

15 MS. PINKSTON: Based on prior rulings, your Honor, we  
16 will he withdraw that, 176, line 18 through 177, line 20.

17 THE COURT: All right.

18 MS. HAMILTON: Okay. The next portion is -- begins  
19 178, 18 through 178, 22, no objection.

20 THE COURT: Okay.

21 MS. HAMILTON: Then beginning 178, 23 to 179, 11,  
22 plaintiff objects based on hearsay.

23 THE COURT: Okay.

24 MS. DYM KAR: And duplicative.

25 MS. O'MALLEY: Could we just have one minute, your

1 Honor?

2 THE COURT: Sure.

3 Tell me when you're ready.

4 (Brief interruption.)

5 MS. PINKSTON: We're ready. I'm so sorry, your Honor.

6 THE COURT: That's all right. So your objection is  
7 hearsay?

8 MS. O'MALLEY: Yes, and also I think it is  
9 duplicative.

10 THE COURT: All right. So let's talk about hearsay,  
11 and then we can deal with cumulative.

12 MS. PINKSTON: About the hearsay objection, your  
13 Honor?

14 THE COURT: Yes. Yes, please.

15 MS. PINKSTON: Okay.

16 THE COURT: Is -- let me you ask this, is the lady  
17 lieutenant --

18 MS. PINKSTON: A defendant, yes.

19 THE COURT. Okay. Go ahead.

20 MS. PINKSTON: So this is absolutely going to -- this  
21 information was communicated to a defendant officer. So it is  
22 being offered to afford the officer's state of mind in terms of  
23 the information that she received and then acted upon.

24 THE COURT: All right. So let me just stop you there.  
25 What's your response to that for state of mind for

1 hearsay?

2 MS. DYM KAR: She doesn't report that that's what was  
3 said to her. McDermott.

4 THE COURT: What does Lieutenant McDermott say?

5 MS. PINKSTON: So essentially what we're coming down  
6 to in terms of the argument that's going to be made is that  
7 Lieutenant McDermott testified at her deposition nearly four  
8 years later that, generally speaking, this is what he  
9 communicated to her.

10 So the situation in terms of these particular details,  
11 that is not in her deposition transcript. She says, I don't  
12 remember the details. I remember that he pointed out the SUV.  
13 These -- this is the group of people. He followed them here.

14 So I believe that's what Ms. Dymkar is getting to in  
15 terms of Lieutenant McDermott not testifying to these exact  
16 details.

17 THE COURT: Is that what you're getting at,  
18 Ms. Dymkar?

19 MS. DYM KAR: It is, your Honor. Unfortunately I don't  
20 have McDermott's testimony here.

21 THE COURT: That's all right. I do. Give me a  
22 moment. Let me see what I can find.

23 (Brief interruption.)

24 THE COURT: All right. This is just the first  
25 reference in Officer -- Lieutenant McDermott's testimony. This

1 is on page 99 of her deposition.

2 Question: At that time when you learned that there  
3 was -- there were people outside, there was an incident outside  
4 the 15th District of the police station, at that time did you  
5 speak to the private citizen who is alleging that he saw what  
6 happened on the 1300 block of North Menard?

7 Answer: I don't know specifically at that time what  
8 time you're referring to. But I did speak to the witness  
9 who -- that said he observed the offenders that were charged in  
10 this case or I approved probable cause or did the TRRs for,  
11 that he observed them do those acts, enter that car, follow  
12 them, and never lost sight of them, and that these were the  
13 same offenders that were right there present on the scene.

14 Question: Where did this conversation take place?

15 Answer: I don't recall specifically, but I do recall  
16 speaking to him in the lobby of the 15th District."

17 So that's just my first reference to lobby. I know  
18 there is lobbies -- it goes on from there.

19 MS. PINKSTON: So, your Honor, I will represent that  
20 it doesn't get much more detailed than that. So we're  
21 essentially at that same dispute between the parties that she  
22 doesn't have a good recollection of this. He obviously does  
23 with the time period. And so that's why it is -- it obviously  
24 goes to her state of mind.

25 Once we get into the OEMC transcript, it is -- she

1 also calls over the radio, so it is clear that she is speaking  
2 with this individual. And so in terms of explaining her state  
3 of mind, this testimony is absolutely relevant as to that.

4 THE COURT: So just from a hearsay standpoint,  
5 Ms. Dymkar, is it your position that for something to be  
6 admissible as a state of mind exception, it needs to track  
7 exactly what the witness whose state of mind is impacted by the  
8 statement recalls? So the declarant, as well as the person who  
9 heard it, have to be in complete sync for it to be admissible?

10 MS. DYM KAR: I wouldn't say in those absolute terms.

11 THE COURT: Because it seems Lieutenant McDermott is  
12 saying she had a conversation that generally conveys this  
13 information, so I'm trying to understand the hearsay objection.

14 MS. DYM KAR: It is that this is more detailed than her  
15 general recollection was. I'm not saying it has to track it  
16 exactly, but she was very -- she was very vague throughout her  
17 testimony as to what she was told. She didn't take a  
18 statement. She doesn't know what she was told.

19 THE COURT: All right. I'm going to overrule the  
20 objection on hearsay grounds. I think there is also an  
21 objection as being cumulative, but I don't -- I'm going to  
22 overrule it on cumulative grounds as well. I don't think there  
23 has been that much testimony on this point, especially as to  
24 Lieutenant McDermott.

25 So that will be in. Line -- page 178, line 23,

1 through 179, line 11, is in.

2 MS. HAMILTON: Did you say 179, line 11? Okay.  
3 That's where we are?

4 THE COURT: Yes.

5 MS. HAMILTON: Okay. So then 179, 12 to 179, 20,  
6 plaintiffs would like still -- would like to be in. I don't  
7 know if defendants have an objection or not.

8 MS. PINKSTON: No objection.

9 THE COURT: Okay. That should come in.

10 MS. HAMILTON: Okay. Unfortunately, the next  
11 designation is going to break a line up. So 180, line 6 to  
12 line 9, up to the word time, no objection.

13 THE COURT: Okay.

14 MS. O'MALLEY: Before that, your Honor, I think we  
15 need to include 180, line 3 through 5, because it is going to  
16 switch over to Ms. Pinkston at this point. So just for jury  
17 confusion.

18 THE COURT: Yeah. You guys have no objection,  
19 correct?

20 MS. O'MALLEY: We just didn't designate it, sorry.

21 THE COURT: Okay.

22 MS. HAMILTON: No objection.

23 THE COURT: All right. So then continuing,  
24 Ms. Hamilton, you're saying through time, on line 9, is coming  
25 in?

1 MS. HAMILTON: Right.

2 THE COURT: Okay.

3 MS. HAMILTON: And then beginning on that page on line  
4 9, the word I, through line 12. Plaintiff objects based on  
5 prior hearings -- prior rulings of your Honor, hearsay, and  
6 relevance.

7 THE COURT: Through where, Ms. Hamilton?

8 MS. HAMILTON: Through line 12 on the same page.

9 THE COURT: Okay.

10 MS. PINKSTON: Yes, your Honor, based upon prior  
11 rulings we would agree to that.

12 THE COURT: Okay. So that's out.

13 MS. HAMILTON: So the videographer is going to have to  
14 break up that line 9 after the word time.

15 MS. PINKSTON: Uh-huh.

16 MS. HAMILTON: Okay.

17 THE COURT: Oh, I'm sorry?

18 MS. HAMILTON: No. So page 180, line 13 through line  
19 24, plaintiff withdraws -- plaintiffs withdraw their  
20 designation.

21 THE COURT: Okay. So that's out.

22 Okay.

23 MS. HAMILTON: Then line -- page 180, line 25 through  
24 118, 3, plaintiff objects based on prior rulings and hearsay.

25 MS. PINKSTON: Your Honor, I would say -- I'm sorry,

1 do you want us to respond?

2 THE COURT: Sure.

3 MS. PINKSTON: I think this is going to be relevant to  
4 the anticipated arguments regarding the missing audio.

5 THE COURT: Okay. Let's deal with lines 4 through 7  
6 on page 181. That question is. "Did you see officers with  
7 their guns drawn?

8 Answer: No, ma'am, not at all."

9 MS. HAMILTON: We didn't get to that yet.

10 THE COURT: Oh.

11 MS. HAMILTON: Plaintiff has no objection to that  
12 piece.

13 THE COURT: Okay. So that's coming in. Thanks.

14 All right. So you're just focusing on the 911 call.

15 MS. HAMILTON: 180, 25 to 181, 3.

16 THE COURT: Okay.

17 MS. DYM KAR: Your Honor, we did take the testimony of  
18 Jill --

19 THE COURT: That's right. Tell me why him being a  
20 non -- asking to be anonymous has to do with being able to find  
21 the 911 call?

22 MS. O'MALLEY: Because that -- the OEMC individual, at  
23 Ms. Maderak's deposition, she was asked about anonymous calls.  
24 And she said that one of the reasons -- she did speak to  
25 whether a call would be marked anonymous.



1 THE COURT: But there is no call found, correct?

2 MS. O'MALLEY: Right. So it would not have been -- so  
3 we asked about preservation as to whether it would have been  
4 collected when they did their search, and she spoke to  
5 anonymous calls on that issue.

6 THE COURT: And what does she say?

7 MS. O'MALLEY: I thought she said that if a call was  
8 marked anonymous, they would not be able to search the number  
9 that it came from.

10 I apologize, I can't recall it as I here sit here  
11 right now.

12 MS. PINKSTON: I was not at the deposition, but my  
13 recollection was that it -- it was highly relevant as to the  
14 individual dispatcher who took that call as to what information  
15 would have been put in and then how it would have been  
16 searchable.

17 THE COURT: All right. Let me ask you this. Hold on.  
18 My understanding was that there was a thorough search, not just  
19 for Mr. Thorton's name or Mr. Thorton's number, but that you  
20 have searched, electronically speaking, high and low to find  
21 this 911 call, or is that not true? I don't -- I don't know.

22 MS. O'MALLEY: That is true.

23 MS. PINKSTON: No, this is true, your Honor.

24 THE COURT: Okay.

25 MS. PINKSTON: I think we're dealing now with certain

1 issues as far as what the retention would be based upon it  
2 being marked anonymous.

3 THE COURT: That's fair. But -- and that's what I am  
4 trying to get to. Does the -- is one of the city's  
5 explanations that in our search high and low, we may not have  
6 been able to search everything because we didn't retain the  
7 right stuff?

8 MS. PINKSTON: Yes.

9 THE COURT: Ms. Dymkar, what's your --

10 MS. DYM KAR: Yeah.

11 THE COURT: That's what I am trying to figure out.

12 MS. DYM KAR: The reason why we took the deposition  
13 from Jill Maderak is that every time there is a 911 call, there  
14 is an event number given.

15 THE COURT: Yes.

16 MS. DYM KAR: If you don't keep the audio, you at least  
17 have the event number and you have the text of what was said.  
18 And this was definitely -- would have been related to this  
19 incident.

20 There is no 911 call, and there is -- and there are  
21 ways that it could have been traced.

22 THE COURT: Well, we better be careful. There is no  
23 recording of a 911 call. Because Mr. Thorton continues to  
24 persist that he made a 911 call.

25 MS. DYM KAR: Jill Maderak confirmed in her deposition

1     that there -- that there would have been some trace of it,  
2     either have the audio -- you have the audio. You have an event  
3     number. You have the -- the text. That's not destroyed.

4             THE COURT: Okay.

5             MS. DYM KAR: Now if the --

6             THE COURT: Do you agree with that, from the city's  
7     perspective?

8             MS. PINKSTON: In terms --

9             MS. O'MALLEY: With respect to her deposition, no.  
10     What she did say was that that call would have to be linked to  
11     that event number.

12             So, for example, if there is a 911 call that comes in  
13     complaining about an event that's occurring on Menard, unless  
14     the 911 call taker linked that 911 call to the event number at  
15     Menard, it would not have been related.

16             THE COURT: What would have been retained? Would the  
17     notes -- are the notes of every 911 call retained?

18             MS. O'MALLEY: Yes.

19             MS. PINKSTON: Yes.

20             MS. O'MALLEY: Event queries are retained for four  
21     years.

22             THE COURT: Okay.

23             MS. HAMILTON: Yes. And they can -- and just to add  
24     to this, just from previous experience, with Jill and these  
25     cases, they can still -- it is not uncommon at all to be

1 given -- if there is an incident where lots of different people  
2 are calling and some of them are remaining anonymous, if there  
3 is a shooting, for example, you could get ten different events.  
4 Some of them never even linked, but they are able to by the  
5 time and the approx- -- the location -- the approximate  
6 location, they're able to search and bring -- give you all  
7 the -- all the event queries, whether or not they're  
8 ever -- there is actually a term for it, whether they're  
9 linked, which is the word we're using here. There is another  
10 word that they use at OEMC -- with the main event query that  
11 ends up being the main event query for the incident. So --

12 MS. DYM KAR: You know, there is an event number given  
13 to every 911 call. When they can trace it to a particular  
14 event, then they do a cross reference.

15 MS. HAMILTON: That's the --

16 (Laughter.)

17 MS. DYM KAR: Yeah. So the main event number would be  
18 cross referenced with this other event number. But -- but the  
19 event number for the 911 call would still continue.

20 So like you'll have these mini event queries or  
21 these event reports from event queries of 911 calls. Some of  
22 them may be linked, and some of them may not be linked. But  
23 they still -- they still exist.

24 And if the Court recalls, there was a disclosure by  
25 defense counsel late in the game.

1 MS. HAMILTON: I recall.

2 MS. DYM KAR: And that was the anonymous 911 calls that  
3 they said that Ms. Jenea (phonetic), I think from OEMC, had  
4 kept those back because she, for some reason, thought the city  
5 didn't want them or whatever. But that came in late.

6 But we got those anonymous phone calls. And no  
7 one -- no one is proposing that we use any of them.

8 But they don't just appear. They're trackable and  
9 traceable, and there is some -- there is some evidence of the  
10 call, whether it is the full audio and event number and  
11 event -- the text or not. But it is -- you know, she said that  
12 every -- every call that comes in there is an event number  
13 given to, and --

14 THE COURT: All right. I have heard enough,  
15 the -- I'm going to keep this out for a couple different  
16 reasons. First and primarily, the only -- the only relevance I  
17 have heard is that there is a possibility that this phone call  
18 was anonymous and, therefore, it may explain why the phone call  
19 has not been found. It doesn't sound like anyone is saying  
20 that the phone call would not have been retained. It is an  
21 issue of finding the right phone call.

22 But there is two maybes here that make me think it --  
23 under 403 it does not have sufficient probative value to get  
24 in.

25 The first maybe is that the phone call was anonymous.

1 The deponent, Mr. Thorton, says, I probably said anonymous, not  
2 -- that he says he definitely did.

3 And the second maybe is that maybe because it was  
4 anonymous, it cannot be -- is readily linked. But that's not  
5 even clear based on what I am hearing here. And I don't hear  
6 the city objecting to factual recitations being made about the  
7 tracking of the phone calls.

8 So those two probablys and maybes make it distantly  
9 relevant and would seem to me to create more jury confusion  
10 than clarity, so I'm keeping it out.

11 MS. HAMILTON: So that's 180, 25 through 181, 3.

12 THE COURT: Correct.

13 MS. HAMILTON: So then no objection to 181, 4 through  
14 7.

15 And then if I can just ask Irene.

16 (Discussion off the record.)

17 MS. HAMILTON: Then 118, 8 through 183, 17, is  
18 plaintiffs's designation, I believe. And I don't know if the  
19 city had any objection to it.

20 MS. O'MALLEY: Yes.

21 THE COURT: Okay. Let me hear from you, Ms. O'Malley.

22 MS. O'MALLEY: This is a section where there was an  
23 affidavit drafted for this deposition as to why Keith Thorton  
24 was unavailable to come to Chicago for his deposition. And  
25 this is Ms. Pinkston going through and following up on

1 questions that were asked by Ms. Dymkar that are not included  
2 in the marked transcripts for the trial about who drafted that  
3 affidavit, what assistance was given, what questions he had  
4 about the affidavit.

5           There is an inference that counsel is -- in the  
6 questioning from Ms. Dymkar that are not included in this  
7 transcript. There is an inference that defense counsel did  
8 something wrong in trying to communicate with Mr. Thorton to  
9 organize his deposition. So it is not relevant at all to his  
10 trial testimony.

11           MS. HAMILTON: And, Judge, just to respond, so  
12 the -- I guess the important piece of information here is that  
13 Mr. Thorton very clearly at first says that he is the one that  
14 typed up the affidavit, which forces --

15           THE COURT: Can I just stop you there?

16           MS. HAMILTON: Yeah.

17           THE COURT: So I know -- I remember looking at this  
18 earlier.

19           MS. HAMILTON: Yeah.

20           THE COURT: Is this in? Is that portion in?

21           MS. DYM KAR: Yeah, I believe it is.

22           THE COURT: Okay.

23           MS. DYM KAR: I think the Court ruled -- I think you  
24 ruled that that was because of bias.

25           THE COURT: Okay. So -- and I just want to

1 understand, so from -- that's coming in -- you're trying to  
2 show bias based on the affidavit.

3 And then even though this is the city's questioning,  
4 the plaintiff wants this in.

5 MS. HAMILTON: So --

6 THE COURT: Go ahead.

7 MS. HAMILTON: Right.

8 THE COURT: So I just want to understand this.

9 MS. HAMILTON: Because I'm on page 39 --

10 THE COURT: Okay.

11 MS. HAMILTON: -- line 14. And I believe this is in.  
12 It -- he is clearly asked -- I'm talking about the affidavit.  
13 The affidavit is in front of him. It is an exhibit to the  
14 dep -- to the deposition. And he's asked very clearly: "Did  
15 you type up this affidavit?"

16 "Answer: That is correct.

17 "You typed it up?

18 "That is correct."

19 So he's asked twice, and he says twice that he's the  
20 one that typed it up. Which forces Ms. Pinkston and Ms. Dymkar  
21 to ask follow-up questions later, which is what we're talking  
22 about now.

23 Ms. Pinkston actually has to correct him because she  
24 knows that that's actually not true, so -- and so then she has  
25 to ask questions to clear it up later because he actually



1 didn't type it up.

2 So it is a point of impeachment.

3 THE COURT: I understand that.

4 MS. HAMILTON: Yeah.

5 (Brief interruption.)

6 MS. O'MALLEY: Your Honor, I apologize, I was wrong.  
7 I had it marked that it was not coming in.

8 I guess to the extent that it was allowed, the section  
9 where Ms. Dymkar was questioning, it was allowed in then. This  
10 section should come in.

11 THE COURT: All right. It makes -- yeah, it makes  
12 sense to me. I know Ms. Dymkar has spent a lot of effort  
13 trying to impeach this witness on things that I don't think are  
14 relevant. But his statement under oath as to a fact related to  
15 this litigation, that sort of turns out not to be true, I  
16 think, is fair impeachment.

17 As I understand the context of where we are now,  
18 Ms. Pinkston tried to clean that up in the deposition, as we  
19 say, in legal lay person's term. But clean up from the  
20 plaintiffs's standpoint you think is further -- further helps  
21 impeach him, I suppose. Is that what you're getting to?

22 MS. HAMILTON: Well, at least it was -- yes. I mean,  
23 because later on there is section where Ms. Dymkar also asks  
24 about this, but this is -- happens to be Ms. Pinkston asking  
25 questions because she had to --

1 THE COURT: Okay.

2 MS. HAMILTON: -- fix something so it wasn't perjury  
3 essentially.

4 THE COURT: What are the -- what are the city's  
5 objections now that we know that the first part is coming in?  
6 I just want -- I want you to be able to clearly make your  
7 record and make sure I'm not missing something.

8 (Brief interruption.)

9 MS. HAMILTON: Just one second, Judge.

10 THE COURT: Okay.

11 (Discussion off the record.)

12 MS. O'MALLEY: So from 181, 8 through 182, 16, based  
13 on the fact that the prior testimony is coming in, then we  
14 don't have an objection to this.

15 THE COURT: All right. You persist on your objection  
16 to the original stuff coming in, and you're are just not  
17 objecting based on that ruling, right?

18 MS. O'MALLEY: Correct.

19 THE COURT: Okay.

20 MS. HAMILTON: Okay. And then --

21 THE COURT: Isn't that -- we're up through 182, 17?

22 MS. HAMILTON: Yes, sir. So plaintiff withdraws --  
23 plaintiffs withdraw their designation from 182, 17 to 183, 17.

24 THE COURT: Okay. So you don't want that in.

25 MS. HAMILTON: Correct.

1 THE COURT: Okay. 182, 17 is out through 183 -- what  
2 line.

3 MS. HAMILTON: 17.

4 THE COURT: Okay.

5 MS. HAMILTON: Yes.

6 THE COURT: Those are all out.

7 MS. HAMILTON: So are we ready?

8 THE COURT: I am. Thank you.

9 MS. HAMILTON: 184, 10 to 184, 23, plaintiff  
10 withdraws -- plaintiffs withdraw that designation.

11 MS. O'MALLEY: What about 183, 18?

12 MS. DYM KAR: 183, 18.

13 You skipped that.

14 MS. HAMILTON: Oh.

15 (Discussion off the record.)

16 MS. HAMILTON: Plaintiff would like to keep their  
17 designation from -- Irene, help me out.

18 THE COURT: 183, 18.

19 MS. DYM KAR: 183, 18 to 184, 2.

20 MS. PINKSTON: Our only objection is that it is  
21 duplicative.

22 MS. DYM KAR: This is the issue of whether there are  
23 four people in the car, three people in the car.

24 MS. PINKSTON: Well, he testified earlier that it was  
25 four.

1 MS. DYM KAR: And that was Ms. Pinkston's question:  
2 Are you sure about the number in the car?

3 And he said, yeah, it is four.

4 THE COURT: Does he ever tell -- it is already coming  
5 in if he says there were four, correct?

6 MS. DYM KAR: Right.

7 MS. PINKSTON: Yes.

8 MS. DYM KAR: And this was one attempt to get him to  
9 withdraw the four, and he's very firm that there were four.

10 And this is, you know, one, of the -- we're going to  
11 say he has the wrong color of the car, he has got the wrong  
12 people in the car -- in the SUV.

13 THE COURT: And does he tell the officers there were  
14 four people in the car.

15 MS. PINKSTON: I don't believe there is any testimony  
16 to that.

17 MS. DYM KAR: He points to the -- I am not sure. I  
18 mean, I would have to research that.

19 THE COURT: Okay. I'm just going to keep this out as  
20 being cumulative. If it is coming in once already, you'll be  
21 able to make that argument.

22 MS. HAMILTON: Okay. I think that brings us to 184,  
23 10. So 184, 10 to 184, 23, plaintiff withdraws -- plaintiffs  
24 withdraw their designation.

25 THE COURT: Okay.

1 MS. HAMILTON: And then -- we object to 184, 24  
2 through 185, 6. And it is a little bit of a strange bit of  
3 testimony because it is essentially Irene talking about a  
4 private -- Mrs. Dymkar having a -- asking questions about a  
5 prior telephone conversation that she had with Mr. Thorton.  
6 And, frankly, the answers are, both to questions that begin  
7 with, do you recall, not did you tell me this? So I'm not sure  
8 how probative that portion of the transcript is since the  
9 answer is, it is ambiguous. It could mean that he doesn't  
10 recall, and it would mean that he didn't say it, so --

11 There is another portion of the transcript, your  
12 Honor, that we talked about last time here where it is -- that  
13 is coming, page 116, line 13 through 17, where it is very clear  
14 -- the question is asked a lot more clearly, was it a dark  
15 colored SUV? And he says, yes.

16 So it is also duplicative. And given the way it is  
17 asked, I think that's a conversation with Ms. Dymkar that's  
18 being questioned about, and we think it should just be out. It  
19 is confusing.

20 THE COURT: 116 where?

21 MS. HAMILTON: Lines 13 through 17.

22 THE COURT: From the city's perspective, why do you  
23 think -- why -- what's your response to the objection to the  
24 ambiguity? It is cumulative in the same way ---

25 MS. PINKSTON: Well --

1 MS. O'MALLEY: They're not using it to attack his  
2 credibility, so this is just -- it shows that he -- he doesn't  
3 remember having a conversation. He doesn't remember the color.  
4 At one point in his testimony he says that it is -- it is dark.  
5 And then at another point he says he can't really recall what  
6 color it was. So I think that part already comes in.

7 This just also -- go ahead.

8 MS. PINKSTON: It is not -- it is not cumulative for  
9 that purpose, because he gave two different answers as to the  
10 color of the vehicle during the deposition testimony. One was  
11 leading; one was not. And this is confirming that he does not,  
12 as he sits there today, remember what color the car was.

13 And in terms of any objection as to -- or, I'm sorry,  
14 did you only want to speak as to the ambiguity?

15 THE COURT: No, no. Go ahead.

16 MS. PINKSTON: I don't think it is ambiguous because  
17 the answer -- while the question does say, do you recall  
18 telling me? The answer is very clear.

19 THE COURT: That's true.

20 MS. PINKSTON: I don't recall the color, ma'am.

21 So there is no ambiguity as to what he's speaking of.

22 And with regard to any objection as to this witness  
23 having spoken prior to the deposition with plaintiffs's  
24 counsel, I think that's obviously relevant since they are going  
25 to be making a bias argument that he was communicating with

1 defense counsel.

2 It is both -- both attorneys on the side have  
3 communicated with this witness prior to the deposition  
4 testimony.

5 THE COURT: Okay. I'm going to let in 184, line 24  
6 through 185, line 2.

7 "Question: Do you recall telling me on May 4, 2013,  
8 that it was a dark color SUV, but you don't know exactly what  
9 the color was?

10 "Answer: I don't recall the color, ma'am."

11 MS. DYM KAR: Your Honor --

12 THE COURT: Hold on. Let me make my record.

13 MS. DYM KAR: I'm sorry. I thought you were done.

14 THE COURT: That's fine. So that's going to come in  
15 because I think Ms. Pinkston is correct, the question is not --  
16 well, it begins in kind of an awkward way. But the answer is  
17 clear, he's saying he doesn't recall the color of the car. And  
18 it does incorporate that this particular witness spoke with  
19 both counsel in advance of his testimony.

20 I'm going to keep out the next question and answer,  
21 which is on page 185, line 3 through 6.

22 "Question: Do you recall telling me on May 4, 2013,  
23 that you did not know the color, but that it was that a dark  
24 color?

25 "Answer: No, no."

1           That answer is ambiguous as to whether he recalls  
2       telling Ms. Dymkar that, whether he recalls telling her on May  
3       4th that, and whether he recalls the color. I have no idea  
4       what he means when he says, no, no. That's going to come out.

5           Ms. Dymkar, I interrupted you, and I apologize. What  
6       were you going to say that?

7           MS. DYM KAR: Could I have just one second to --

8           THE COURT: Okay.

9           MS. DYM KAR: -- confer with Ms. Hamilton?

10          (Discussion off the record.)

11          MS. DYM KAR: Your Honor, I'm just trying to understand  
12       your ruling or the reason for the ruling on 185, 3 through 6.  
13       Is it because the -- I'm referring to the conversation he had  
14       with me or --

15          THE COURT: That's part of the problem. And the  
16       answer is ambiguous. He's saying, there are one, two -- I'm  
17       counting -- counting at least three, possibly four facts in  
18       this one question. Do you recall telling me, that's one fact;  
19       on May 4, 2013, second fact; that you did not know the color,  
20       third fact; but that it was a dark color, fourth fact.

21          Answer: No, no.

22          MS. DYM KAR: I understand the Court's ruling.

23          THE COURT: Okay.

24          (Discussion off the record.)

25          MS. HAMILTON: Okay. So plaintiff then withdraws



1 plaintiffs's -- I'm sorry I keep doing that -- withdraw their  
2 designation of 185, 15 through -- I'm sorry, line 14 beginning  
3 at the end of the line, through line 21.

4 THE COURT: Okay. That will be out.

5 MS. HAMILTON: And then beginning on the next line,  
6 which is 185, 22 through 187, 7, this is, again, the affidavit  
7 issue, whether he typed it or not. Plaintiff wants that in.

8 MS. O'MALLEY: No objection.

9 MS. PINKSTON: No objection based upon your prior  
10 ruling.

11 THE COURT: Okay. Where do we go from there?

12 MS. HAMILTON: Okay. So we're on the last designation  
13 is 187, 15 through line 23. And plaintiff makes an objection  
14 based on the fact that it is cumulative.

15 THE COURT: What's the city's response?

16 MS. PINKSTON: It is not cumulative. I believe this  
17 is the very first time that he's asked this pointed question  
18 whether he is certain as he sits there today that it is the  
19 same SUV.

20 MS. DYM KAR: Also I believe that two -- both vehicles  
21 with the -- with the plaintiffs and with their friends were  
22 both SUVs, I believe.

23 THE COURT: I don't understand that, what you are  
24 saying there.

25 MS. DYM KAR: He's saying is it the same SUV that was

1 in front of the 15th District police station. There were two  
2 SUVs in front of the police station.

3 THE COURT: Okay. I'll overrule the objection as to  
4 -- as far as cumulative goes.

5 We're done. It only took us three hearings, I think.  
6 Four? Who is counting.

7 All right. What's next? I don't have the docket in  
8 front of me. Do one of you know our next dates?

9 MS. DYM KAR: Oh, yes, your Honor. Did you want to  
10 deal with the Zone 12 issues today?

11 THE COURT: I do. Yeah, I do.

12 Can you give me like -- are you not ready to discuss  
13 it?

14 MS. O'MALLEY: Oh, she's ready.

15 THE COURT: Okay. Can you give me like five minutes?  
16 I want to relook at what you had submitted, and then -- so I  
17 just want five minutes to refresh myself with that.

18 And please feel free to use the bathroom.

19 (Brief recess.)

20 THE COURT: All right. Back on the record.

21 So we're talking about the Zone 12 radio  
22 transmissions. The -- let me start with plaintiffs. This is  
23 Document 429. The first portion the city has no objection to.  
24 So that's going to come in.

25 And also I'm looking at the city's filing Document

1 430.

2 The second submission that the plaintiffs would like  
3 to put in is .wav 585, 586. I think that's probably the best  
4 way for delineation.

5 And the city's objection is relevance and potential  
6 for jury confusion. I don't know if it Ms. O'Malley or  
7 Ms. Pinkston or anyone else, what -- can you illuminate that  
8 issue more for me?

9 MS. PINKSTON: Sure, your Honor. As I understand it,  
10 the argument from plaintiffs's perspective is that the officers  
11 knew that no police officer had been actually hit with a bottle  
12 or injured by a bottle. But here no plaintiff was charged with  
13 battery. And the officers that signed the complaints against  
14 David Wilbon, it was for aggravated assault. And they were not  
15 told about anything regarding a battery. They were told that  
16 he was throwing bottles at the location where they were  
17 experiencing bottles being thrown at them.

18 So in terms of the relevance, as to the claims, I fail  
19 to see the relevance as to this audio for those particular  
20 claims that David Wilbon is bringing.

21 And then in terms of the jury confusion, this  
22 specific -- the dispatcher is talking about battery to a PO.  
23 No one was charged with battery here. And I think that there  
24 is the potential for jury confusion because many lay people  
25 hear the terms assault with battery, assault and battery --

1 THE COURT: Right.

2 MS. PINKSTON: -- and they do not realize that there  
3 is a difference between the two legal terms.

4 THE COURT: Okay. Let's go first to relevance.  
5 Ms. Dymkar, what counts is this evidence relevant to?

6 MS. DYM KAR: It is the counts having to do with  
7 arrest. This is 4514(a). That's Mark Kushiner. So Mark  
8 Kushiner is at the 15th District. He has just encountered  
9 Keith Thorton, and he's obviously been told that somebody got  
10 hit in the head with a bottle, and he's verifying that.

11 So he calls the dispatcher. There is a dispatcher.  
12 Then talks to the 25th District, 2510R would be a sergeant in  
13 the 25th District, and says that was a mistake, there is no  
14 battery to a PO.

15 And then he -- he persists saying, but I heard someone  
16 was throwing bottles at the police. And then we heard that  
17 too, but no one got hit.

18 So he's already got reason to believe that the  
19 information coming to him from Keith Thorton is just wrong.

20 THE COURT: Because Mr. Thorton says it hit a police  
21 officer.

22 MS. DYM KAR: Right.

23 THE COURT: All right. I'm going to let this in. I  
24 just want to make sure the city is not disputing 4514(a) is one  
25 of the defendants, correct?

1 MS. PINKSTON: You said that was Kushiner?

2 MS. DYM KAR: Yeah, it is Mark Kushiner.

3 MS. PINKSTON: Yeah.

4 Right?

5 MS. O'MALLEY: Yeah.

6 THE COURT: Okay.

7 MS. PINKSTON: No, your Honor.

8 THE COURT: Okay. I'm going to let that get in --

9 come in. I think it is relevant for the reasons that

10 Ms. Dymkar just articulated. I don't -- I don't really see the

11 jury confusion. I don't -- I don't really see this as jury

12 confusion. I guess I understand conceptually what you're

13 saying, Ms. Pinkston.

14 MS. PINKSTON: Okay.

15 THE COURT: But I think the relevance far outweighs

16 any potential jury confusion as to the malicious prosecution

17 claim because it is directly relevant to the false arrest.

18 And I would say if the city is -- wants to offer some

19 type of limiting instruction or an appropriate jury instruction

20 to address that concern, I will consider it.

21 MS. PINKSTON: Thank you, your Honor.

22 THE COURT: All right. So then I want to -- that

23 takes care of what the plaintiff would like in. Correct,

24 Ms. Dymkar?

25 MS. DYM KAR: Yes, Judge.

1 THE COURT: See how quickly we got that done.

2 MS. DYM KAR: Love it.

3 THE COURT: That was good.

4 (Laughter.)

5 THE COURT: All right.

6 MS. DYM KAR: Now we're going to screech to a halt.

7 THE COURT: Now we'll see what the city wants in.

8 I have a settlement conference at two, so we'll be  
9 done by then.

10 MS. DYM KAR: We'll talk fast.

11 THE COURT: All right. So let me go through what I  
12 understand the city to be saying, why this is relevant. The  
13 audio makes clear that the -- these officers that arrested  
14 plaintiff knew about the brawl.

15 There is going to be plenty of evidence that the  
16 officers knew that there was a large disturbance that evening,  
17 correct?

18 MS. PINKSTON: Yes.

19 THE COURT: Okay.

20 (Brief interruption.)

21 THE COURT: What I am having trouble with from the  
22 city's perspective is the notion that there is a brawl, that  
23 they experienced it, they saw what they saw, they knew what  
24 they knew, how does this radio transmission, other than  
25 providing -- I don't want to belittle it -- but kind of that

1 entertainment value that a trial has? We get to hear the real  
2 life communications. How is it furthering any of the -- how is  
3 it relevant beyond that and how does it provide something more  
4 or different than what the officers's testimonies -- their  
5 individual and collective testimony will be about what happened  
6 that evening?

7 MS. PINKSTON: It is going to be quite different, your  
8 Honor, because in this particular situation, due essentially to  
9 we have got a large time gap between the time of this incident  
10 and the time that discovery is taking place in the civil  
11 litigation.

12 THE COURT: Okay.

13 MS. PINKSTON: So their deposition testimony, what  
14 they're going to be able to recall on the stand, is going to  
15 be, you know, general statements, is going to be what their  
16 general recollections are now seven years after the fact. But  
17 that, however, is not what they had fresh in their minds on  
18 that particular day.

19 Additionally, the gravity of the situation, the  
20 severity of the situation, it is being communicated over the  
21 radio, is going to give context as to what the situation was  
22 that was unfolding that these officers did here in the moment,  
23 that now they are being approached by someone saying, this is,  
24 you know, what I saw, this is who I am, that sort of thing.

25 So it is not going to be cumulative in the sense of

1 this is going to be detailed, this is going to be the radio  
2 zone, this is going to be the information that these officers  
3 had to rely upon.

4 And put simply, I think this is one of the most  
5 relevant pieces of evidence because my understanding is  
6 plaintiffs's counsel's large -- largely going to argue that  
7 they did not have enough information to arrest these  
8 individuals.

9 And so this is the information that they had prior to  
10 knowing about Keith Thorton.

11 THE COURT: So one of the objections the  
12 defendant -- or plaintiffs stated, no defendant said they heard  
13 this communication. All defendants recall hearing was just  
14 some general information about fighting in the 25th District.

15 True or not true?

16 MS. PINKSTON: That it is general?

17 THE COURT: That no defendants said they heard this  
18 communication.

19 MS. PINKSTON: Well, in our response we provided the  
20 deposition testimony regarding --

21 THE COURT: Okay.

22 MS. PINKSTON: So Millan, Cerda, Esquivel, Garcia,  
23 Graney, Kushiner, McDermott, Silva, and Valentin all testified  
24 as to the radio dispatch communications that they heard  
25 regarding this incident.



1           THE COURT: Okay. And it is from the 25th District,  
2 correct? It is this communication.

3           MS. PINKSTON: That is correct. Because 25 and 15  
4 share a zone, Zone 12.

5           THE COURT: How long is this?

6           MS. PINKSTON: Forty-nine -- lines 49, 17 to 53, 21.  
7 And the timing on it -- it is not long, your Honor.

8           MS. DYM KAR: May I be heard, your Honor?

9           THE COURT: Of course.

10          MS. DYM KAR: Just to -- as background information, the  
11 police officers all pretty much consistently testified at  
12 deposition that they were -- you know, they are generally aware  
13 of what was happening in the other district. But other than a  
14 couple of officers who came from that -- drove from that area,  
15 they had no intention of going there.

16                 In fact, they were -- I think they were at the end of  
17 their shift. So, you know, it is understandable that they  
18 weren't quite focused on what was going on somewhere else that  
19 they weren't going to respond to and didn't need to respond to.

20                 So, in order for there to be collective knowledge, it  
21 can't be just communication, just somebody in the vast police  
22 department, it has to be information that's actually relayed  
23 and specifically relates to the persons arrested.

24                 This particular --

25          THE COURT: So I agree with that. But if they were in

1 the same zone and they testified that they heard these radio  
2 communications --

3 MS. DYM KAR: And we think they did. That was going to  
4 be my next --

5 THE COURT: Okay.

6 MS. DYM KAR: -- point. We haven't -- you know, we  
7 just went through, and by what we determined, Kushiner said on  
8 27 and 29 of his deposition, he could hear the reports, he  
9 doesn't remember the details.

10 McDermott said, I heard a distress call. That's 88.  
11 93, don't recall the details of what I heard.

12 Cerda --

13 THE COURT: Does he -- let me stop you there.

14 MS. DYM KAR: Okay.

15 THE COURT: Does he ever say or any of the defendants  
16 ever say, I heard the radio transmissions that day, but wasn't  
17 paying attention and didn't really keep track of what was going  
18 on that day?

19 MS. DYM KAR: I --

20 THE COURT: Because it sounds to me what you're  
21 saying, as -- I just want to -- I haven't looked at these  
22 transcripts. It sounds to me what you're saying is, I recall  
23 listening to radio transmissions, but today at the time of my  
24 deposition I cannot tell you what they said.

25 MS. DYM KAR: I don't think that they knew it at the

1 time.

2 THE COURT: Why do you -- is there something in the  
3 deposition that tells you that?

4 MS. DYM KAR: Because they said -- they never said that  
5 they heard -- they heard anything of this sort. And I guess my  
6 next point is going to be, how prejudicial this is because it  
7 is about gangs and guns and gunshots --

8 THE COURT: I --

9 MS. DYM KAR: -- and all that. And there is nobody who  
10 ever -- there is no defendant who ever says, I heard that there  
11 was gang, you know, warfare.

12 There were many, many calls, and we're talking about  
13 a -- you know, a three by three block area, and we're talking  
14 about five hours.

15 This starts at 2:00 o'clock. Plaintiffs were stopped  
16 at 2:30. I'm not even sure, you know, how this -- this would  
17 relate to our particular plaintiffs. But they -- no officer  
18 said that they heard this -- this intensity of a problem that  
19 occurred in the 25th District.

20 And we're agreeing that there was a problem there.  
21 But this disturbance was -- lasted over a period -- a long  
22 period of time, over a big -- a big, for this type of event, a  
23 big geographical area.

24 And our looking at the defendants's deposition  
25 testimony, you know, the most they say is they heard is an

1 immediate assistance. Don't recall hearing about Menard.

2 Heard the reports. Don't remember the details. Maybe heard  
3 over the radio something about Menard.

4 And for the -- for the defendants to be able to say,  
5 this is exactly what we heard and that's why we did what we  
6 did, there is something missing there. There has to be actual  
7 communication that's relayed and that is comprehended by the  
8 person who does the arrest.

9 Just because there is somebody in the police  
10 department at another location that is reporting different  
11 things, doesn't mean that there's collective knowledge.

12 And our biggest point is, this is really prejudicial  
13 because there is so much stuff going on in this particular  
14 area.

15 THE COURT: Okay. I'm going to look at the deposition  
16 transcripts on this one. And you have included the transcript  
17 in the earlier submission, correct?

18 MS. PINKSTON: That's correct, your Honor. And the  
19 citations are within our response.

20 And I just want to make one point for the record.

21 THE COURT: Sure.

22 MS. PINKSTON: And this is -- this goes to argument  
23 with the plaintiffs's position that they didn't testify as to  
24 the severity because they didn't know the details. Nearly  
25 every single one of these officers testified that they heard a

1 10-1, and that their understanding was that is the most serious  
2 call.

3 So to -- I just want to make it --

4 THE COURT: And then the 10-1 was withdrawn.

5 MS. PINKSTON: Correct. Some officers did not recall  
6 that.

7 THE COURT: Okay.

8 MS. PINKSTON: And so I just want to make the argument  
9 for the record that in terms of these individuals testifying as  
10 to that is their recollection, I think that speaks to what they  
11 perceived as the severity because what they recall is that it  
12 was a 10-1.

13 THE COURT: Okay.

14 MS. HAMILTON: Judge, just so that -- just since your  
15 Honor is going to reserve ruling, so I think also that the  
16 hearsay objection would apply to -- if they're trying  
17 to -- even for the defendants, I think, because then they're  
18 proposing statements of their own parties, so also based on  
19 hearsay.

20 MS. PINKSTON: That would be an exception. It is the  
21 present sense impression. Some of these officers are the ones  
22 that are -- bottles are being thrown at them. They're calling  
23 for assistance.

24 And then in terms of the other officers, it goes to  
25 their state of mind.

1 THE COURT: All right.

2 MS. DYM KAR: Their -- this particular excerpt of the  
3 10-1 -- is -- it is disregarded almost immediately when it is  
4 declared.

5 And Ms. Maderak, you know, testified that sometimes  
6 the dispatchers will sense that there might be a problem,  
7 declare a 10-1, and then immediately there is a disregard of  
8 it.

9 It is just a -- it is just really prejudicial to the  
10 plaintiffs that this would come in. None of the beats that are  
11 listed here are from the 15th District or have a -- you know,  
12 are defendants or have anything to do with this case, so --

13 MS. PINKSTON: That is --

14 MS. DYM KAR: -- I think the defendants have to -- the  
15 defendants have to say that they heard -- you know, that they  
16 heard this information. And it is so -- it is so incendiary,  
17 gun, gang members, gunshots.

18 And that's not what they were dealing with in the 15th  
19 District, you know, when they -- when they encountered Keith  
20 Thorton and the plaintiffs.

21 THE COURT: Okay.

22 MS. PINKSTON: Your Honor, just for the record,  
23 defendants Plovanich, Millan, Garcia, and Silva all testified  
24 they were at this location.

25 MS. DYM KAR: They're not on this -- this -- Silva and

1 Garcia are not in this -- this excerpt.

2 MS. PINKSTON: But what you said was is that they  
3 were -- none of the defendants were involved in this. They  
4 absolutely were.

5 THE COURT: What excerpt are you referring to?

6 MS. DYM KAR: This excerpt of the --

7 THE COURT: The communication?

8 MS. DYM KAR: -- the communications.

9 THE COURT: Right. But this is what they heard, not  
10 what they -- I mean, as far as present sense impression, to  
11 make it a hearsay exception, I suppose someone needs to be  
12 there saying it, I suppose, although not necessarily. But more  
13 to collective knowledge and state of mind they have to hear it,  
14 not say it.

15 MS. DYM KAR: And just because it is transmitted  
16 doesn't mean that they heard it.

17 THE COURT: That's what I said --

18 MS. DYM KAR: -- and/or comprehended it. And that's  
19 what I'm getting when you look at --

20 THE COURT: That's what I said, they had to have heard  
21 it.

22 MS. DYM KAR: Yeah.

23 THE COURT: That's why I said that.

24 MS. DYM KAR: Right.

25 THE COURT: Okay.

1 MS. DYM KAR: And we can provide you with citations too  
2 of the defendants that I was just reading out loud of when they  
3 said that they -- they remember there were reports. They  
4 remember there was a disturbance. They remember there was a  
5 distress call. Don't remember much of anything else.

6 And to assume that this is what they would have  
7 remembered on that day, I think is not -- that's not clear and  
8 that's not correct.

9 THE COURT: All right. So next is Document 413,  
10 Millan. Page 60, line 8 through page 62, line 24.

11 So is -- is it true that the plaintiffs were already  
12 in custody when these communications are made?

13 Defendants, in your objection or response, you're  
14 saying that that's not -- we don't know that because there is  
15 no time stamp.

16 MS. PINKSTON: Correct.

17 THE COURT: Ms. Dymkar, why do you say that?

18 MS. DYM KAR: Well, we have -- we have different  
19 versions of the OEMC recordings that have been given over time,  
20 and we do have -- we do have a talking clock.

21 But this is a -- first of all, there is a description  
22 of it being at Thomas and Monitor. And I -- I printed out a  
23 Google map just so that the Court would understand the  
24 distances we're talking about here.

25 1320 North Menard is on this map and Monitor and



1 Thomas is on this map. It is four-tenths of a mile away.

2 So this is something happening at Monitor and Thomas,  
3 that's happening within seconds of Kushiner encountering Keith  
4 Thorton. So -- and it is -- There is -- there are no breaks in  
5 this, so it starts and says, Monitor and Thomas. Mentions  
6 somebody wearing a black shirt, blue jeans, getting into a gray  
7 vehicle.

8 David Wilbon is not wearing -- he's not wearing a  
9 black shirt and blue jeans. So there -- this is coming over  
10 the air from Thomas and Monitor within seconds of Kushiner  
11 coming on the air saying, we just got flagged down across from  
12 the 15th District.

13 So it could not relate to what was happening with the  
14 plaintiffs and Kushiner.

15 THE COURT: Okay.

16 MS. DYM KAR: You know, it continues that there is this  
17 problem at Thomas and Monitor. And then there is -- there is  
18 indication that there is some -- this 10-1 is coming from a  
19 burner phone, which means that -- and it seemed to be baffling  
20 to the police and the dispatcher because they initially thought  
21 that this request for a 10-1 came from a police officer.

22 But then a sergeant had traced it to a burner phone,  
23 and then they all seemed to be kind of -- kind of confused  
24 because this really looked like then it was some private  
25 citizen who was just a -- causing problems. You know, a

1     troublemaker or a prankster.

2             But our biggest problem is that it cannot relate to  
3     the plaintiffs because the plaintiffs are already at the 15th  
4     District, and -- Kushiner has already --

5             THE COURT:   Okay.

6             MS. DYM KAR:  -- stopped.  They are already arrested.  
7     Already at the 15th District.

8             And then if you -- if you refer to, you know, any of  
9     the -- anything having to do with the location, Thomas and  
10    Monitor is not -- is not near 1320 North Menard.

11            THE COURT:   Tell me.

12            MS. PINKSTON:  So if my understanding is correct,  
13    plaintiffs are going to argue that Kushiner never spoke with  
14    Keith Thorton, is that correct?

15            MS. DYM KAR:  I think Kushiner is going to say that he  
16    did.

17            MS. PINKSTON:  Right.  And are you going to attack his  
18    credibility on that issue?

19            MS. DYM KAR:  Well, Keith Thorton says that he didn't  
20    speak to Kushiner.  Kushiner said he did speak to Keith  
21    Thorton.  So there is some discrepancy there.

22            MS. PINKSTON:  So this is not coming in for the truth  
23    of the matter asserted, which I believe is essentially what  
24    you're saying is that this could not be true, is that this is  
25    related.

1           It is, however, related because this is exactly as  
2   Officer Kushiner testified his encounter with Keith Thorton to  
3   be. That he was flagged down by citizen who said that he had  
4   witnessed this individual throw the bottle.

5           So this is going to rehabilitate Officer Kushiner  
6   after you attack his credibility.

7           THE COURT: Tell me that. So if that's --

8           (Laughter.)

9           THE COURT: That has the makings of a prior consistent  
10   statement.

11          MS. DYM KAR: Yeah, if they're referring to that one  
12   little part where Kushiner says, we got flagged down. There is  
13   someone saying the offenders are across from the 15th District  
14   station on Madison, we're pulling up on them, hold on. I would  
15   think that that would come in.

16          But everything before that having to do with Thomas  
17   and Monitor, immediately before that, like within seconds of  
18   Kushiner coming on the air, and then all that stuff afterwards  
19   is just not -- it is not relevant, and it is prejudicial.

20          THE COURT: What's your view on that, Ms. Pinkston?

21          MS. PINKSTON: I -- everything before that is relevant  
22   as to the officers's describing the 10-1 they heard and that  
23   sort of thing. Because while -- again, it is going to -- it is  
24   going to be corroborating the details that they do remember  
25   hearing over the radio that night.

1 THE COURT: Okay.

2 MS. PINKSTON: And of course they can argue that those  
3 details that they recall were either not correct or that they  
4 misheard, that it wasn't related. But that's all argument.

5 This -- to the extent that they're going to be  
6 attacking them on those issues, this is corroborating their  
7 recollection --

8 THE COURT: Okay.

9 MS. PINKSTON: -- and their state of -- and  
10 essentially it goes directly to their state of mind.

11 THE COURT: I'm tracking that. What about after?

12 MS. PINKSTON: In terms of -- okay. So this is July  
13 24th.

14 THE COURT: So after Officer Kushiner says, I'm  
15 getting flagged down, I'm getting pulled over, I'll be back,  
16 that is, you know, potentially a prior consistent statement.  
17 That's a present sense impression.

18 But after --

19 MS. PINKSTON: Oh, after, after he's saying, looks  
20 like my guy said that he followed these guys from over here we  
21 got two carloads of guys. You have got another car. Step over  
22 here right across from the 15th District. This all goes to him  
23 corroborating Kushiner's story that he was specifically told by  
24 Keith Thorton that he followed them over specifically to this  
25 location, and these officers --

1           THE COURT: Those are all part of a prior -- to me  
2 potentially prior consistent statement if the focus of the  
3 plaintiffs's attack is going to be that Thorton never provided  
4 that information to Kushiner.

5           I'm sorry, Kushiner not Kushiner.

6           MS. DYM KAR: Your Honor, anything that Kushiner is  
7 saying on the air is not the problem, it is everything in  
8 between. So there are all these conversations happening at  
9 once.

10           What they're saying is happening at Thomas and Monitor  
11 while Kushiner is talking to the -- talking to Keith Thorton  
12 shouldn't come in.

13           And then even the -- our clock says it starts at  
14 2:00 -- 2:22 at Monitor and Thomas. They want to get in the  
15 description of somebody with a black shirt, blue jeans, someone  
16 who just battered a police officer, but that -- nobody says  
17 that our clients are at Thomas and Monitor. And David Wilbon  
18 is not wearing a black shirt, blue jeans.

19           THE COURT: Okay.

20           MS. DYM KAR: So they're trying to piggyback on the  
21 description.

22           And there are plenty of descriptions. And we have  
23 listened to the whole five hours. Plenty of descriptions of  
24 people running through yards and what they were wearing, what  
25 they looked like.

1 But you can't take something that might be similar to,  
2 you know, our clients because they're black, I guess, because  
3 it is not the same clothes, and say that, you know, that this  
4 has to be -- this has to be our client.

5 This Thomas and Monitor is really far from 1320 North  
6 Menard.

7 THE COURT: I think she's got a point on that.  
8 Explain.

9 MS. PINKSTON: They -- so --

10 THE COURT: Anything Officer Kushiner is saying, I  
11 understand that. I get why that's -- I'm going to overrule  
12 those objections.

13 But if there is -- I have listened to a lot of zone  
14 radio from CPD, and there is a lot of things going on. And,  
15 you know, it actually takes, I would say, a trained ear, an  
16 experienced ear -- I'm sure everyone at this table can do it --  
17 where you can sit and decipher what's related to -- what you  
18 were listening to.

19 And that's because we have all dealt with that type of  
20 communication. But I -- I remember the first time I heard it,  
21 I was like -- I had to listen to even figure out what zone I  
22 was supposed to be listening to.

23 So we're -- that all creates in my mind jury  
24 confusion. If we're focusing on what Kushiner heard and  
25 Kushiner said, and, you know, presumably the collective

1 knowledge doctrine would say would be relevant certainly for  
2 Officer Kushiner and perhaps others, that's one thing.

3 But to hear the whole zone and is kind of unfettered  
4 is -- I think we run into a jury who will be confused and, you  
5 know, entertained and not -- you know, in a constructive way as  
6 to what was going on that night, and get them away from what is  
7 at issue, which is what do these defendant officers know. And  
8 they do have a trained ear. They do know what they're  
9 listening for.

10 MS. PINKSTON: So if I understand you correctly then,  
11 it would be essentially page 61, line -- what would come in is  
12 60, line 18.

13 THE COURT: Do you have a second set of what you're  
14 looking at there? They don't have lines.

15 MS. PINKSTON: I do not. It was the attachment to  
16 Document 413 dash 1. And I believe it was an attachment to  
17 430 as well.

18 It is the transcript we provided you guys with.

19 THE COURT: You know, let's do this, let's do this  
20 because I -- we're starting to get -- we did a really nice job,  
21 but we're starting to get a little bit sloppy here. I have got  
22 a 2:00 o'clock settlement conference, so -- although it is a  
23 case that I have already done two on, the same case. I don't  
24 need a lot of prep time. But I do think as a group we're kind  
25 of losing our focus.

1           So let me -- is there anything else on the record we  
2 need to do? Because I would like to get Ms. Warren out of  
3 here. I just want to look at the docket and see when we're  
4 supposed to get together again and see if we need to do this,  
5 Zone 12, sooner than we get together again.

6           MS. PINKSTON: No, your Honor.

7           THE COURT: Anything else on the record first? Tell  
8 me that. Which is fine if you do. Let's just get that done.

9           MS. PINKSTON: No, your Honor.

10          THE COURT: Okay. From the plaintiffs's standpoint?

11          MS. DYM KAR: No.

12          THE COURT: Okay.

13          MS. DYM KAR: We have another excerpt to go through  
14 but --

15          THE COURT: Sure. All right. Thanks so much.

16          Okay. Let me -- when are we supposed to get together  
17 again?

18          MS. DYM KAR: September 13th for a pretrial conference.

19          THE COURT: All right. Is that going to give -- so  
20 that I'm -- so that the deposition editing can go forward? I  
21 don't actually know, how much does it take to do the zone  
22 editing in the deposition?

23          MS. PINKSTON: The deposition cannot go forward until  
24 we know your ruling on --

25          THE COURT: Okay.



1 MS. PINKSTON: Yeah.

2 MS. DYM KAR: I apologize.

3 THE COURT: Oh, okay.

4 MS. PINKSTON: But the zone editing will not take long  
5 at all.

6 (Laughter.)

7 THE COURT: So you're saying -- Ms. Dymkar, you're  
8 saying September 12th?

9 MS. DYM KAR: 13th.

10 MS. PINKSTON: 13th.

11 THE COURT: Do you guys have time next week?

12 MS. PINKSTON: I do, your Honor.

13 MS. DYM KAR: I'm sorry, what was the question, your  
14 Honor?

15 THE COURT: Do you guys have time next week?

16 I would like to get the -- maybe we can get the ruling  
17 on the show-up taken care of and we can get this transcript  
18 issue taken care of.

19 MS. HAMILTON: What day is your Honor looking at?

20 THE COURT: I can't do Monday. Tuesday I can't do.  
21 What about Wednesday?

22 (Discussion off the record.)

23 MS. PINKSTON: I have depositions all day in a case  
24 where we represent different parties, so I believe --

25 THE COURT: On the 24th?

1 MS. PINKSTON: On the 24th, yeah.

2 THE COURT: Okay.

3 MS. DYM KAR: We have depositions, subpoenaed  
4 depositions, on the 24th and 25th.

5 MS. HAMILTON: Well, that takes care of that week.

6 MS. DYM KAR: There was a problem with the 23rd?

7 MS. HAMILTON: Yes, there are no court reporters.

8 MS. DYM KAR: Oh.

9 THE COURT: Well, I can tell you -- the 28th, so the  
10 week of the 28th I have other judicial obligations, but I will  
11 be here. My schedule is light because these other obligations  
12 are hard to predict.

13 So I would like to get us in so we could get that done  
14 sooner.

15 Let's go off the record.

16 (Discussion off the record.)

17 THE COURT: All right. So let's say September 1st,  
18 1:30. I'll rule on the show-up issue, and -- I may put an  
19 order out in advance on this issue.

20 And then we can go through the transcript of the  
21 calls.

22 MS. HAMILTON: So, Judge, just -- I don't need to be  
23 here because Ms. Dymkar is handling this.

24 THE COURT: Okay.

25 MS. HAMILTON: I cannot be here September 1st, but --

1 THE COURT: Okay.

2 MS. HAMILTON: -- you should go ahead without me.

3 THE COURT: All right.

4 MS. HAMILTON: Thanks. I will be in -- on my way to  
5 Wales.

6 THE COURT: Oh, good.

7 MS. HAMILTON: Yes.

8 THE COURT: That must be for vacation.

9 MS. HAMILTON: My husband is Welsh. We are going to  
10 visit his family.

11 THE COURT: Oh, good.

12 (Discussion off the record.)

13 (Which concluded the proceedings:)

14 CERTIFICATE

15 I HEREBY CERTIFY that the foregoing is a true, correct  
16 and complete transcript of the proceedings had at the hearing  
17 of the aforementioned cause on the day and date hereof.

18

19 /s/ **Pamela S. Warren**  
Official Court Reporter  
20 United States District Court  
Northern District of Illinois  
21 Eastern Division

September 20, 2017  
Date

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